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IN THE

Supreme Court of the United States

October Term, 1940

No. 648

MANUEL V. DOMENECH, TREASURER,
Petitioner,

vs.

SAN JUAN TRADING COMPANY, INC.,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS, FIRST CIRCUIT, AND SUPPORTING BRIEF

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PETITION FOR WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS, FIRST CIRCUIT.

To the Honorable, the Chief Justice, and the Associate Justices of the Supreme Court of the United States:

Petitioner, Manuel V. Domenech, Treasurer of Puerto Rico, prays a writ of certiorari to review the judgments of the Circuit Court of Appeals for the First Circuit, October 16, 1940 [114 F. (2d) 969, *Advance Sheets*], affirming [R. 63] the judgment[1] of the District Court of the United States for the District of Puerto Rico invalidating Subdivision 7 of Section 16 of the insular Internal Revenue Law, as amended in 1938, on several grounds, in-so-far as, in classifying matches for the purposes of the sales tax, with relation to the substantially revenue producing sales of the uncolored ones packed in the popular small wooden box, 25 to ~~10~~ 50 in a box, it differentiates between the square matches [cut from hardwood] and the round ones [punched out of soft wood] and places a

[1] Two appeals to the Circuit Court of Appeals (Nos. 3567 and 3568 there) by the opposing parties, from a single judgment of the District Court [R. 35-46; 50-51].

higher tax on sales of the former. [R. 43-47; *infra*, p. 3-6].

The decision of the Circuit Court of Appeals was by a divided court. Each of the three judges wrote a separate opinion. JUDGE MAHONEY considered [R. 47-59] the assailed legislation invalid upon all the grounds upon which it is attacked [except the alleged violation of "uniformity in taxation"]. He agreed in substance with the opinion [R. 18-34] of the District Court.

PRESIDING JUDGE MAGRUDER begins his opinion [R. 59-62] "With some misgivings, I concur in the result". He does not consider the legislation violative of the due process or equal protection clauses of the Organic Act for Puerto Rico [or of the Constitution], and he questions "whether the provisions of the reciprocal trade agreement with Sweden can be invoked by the present plaintiff, a Puerto Rican corporation", but he does think the legislation violative of "the spirit, and I think the letter" of the *proviso* added to section 3 of the Organic Act by the "Butler Act" of March 4, 1927 (44 Stat. 1418).

JUDGE PETERS, on the other hand, dissenting [R. 62], holds the insular legislation valid. He says:

> "I feel obliged to dissent from the conclusions of the majority of the court because I cannot find sufficient justification for invalidating the action of the Puerto Rican Legislature. I agree with Judge Magruder that there is no violation of Section 2 of the Organic Act, nor do I think the provisions of the Swedish Trade Agreement can be invoked.
>
> "As to Section 3 of the Organic Act, it seems to me that there is no violation. The classification made in the tax on matches appears to me to be reasonable, based, as it is, on differences in shape, method of manufacture and nature of the material; but, assuming that different minds may reasonably take different views on that point, I think the opinion of the Legislature should prevail.
>
> "The fact that the classification may be called

narrow does not, as I look at it, authorize us to say it should not be applied. Such discrimination as may result is incidental to the principal purpose of the Act which is the legitimate one of fostering home industries."

On a subsidiary question presented, all three of the judges of the Circuit Court of Appeals agree with the District Court that any invalidity of the greater rate of tax here involved extends only to the excess over the amount of the tax rate on other matches, and does not invalidate the entire tax as the respondent claims it does, but only the excess rate.

STATEMENT

JUDGE MAHONEY in his opinion in the Circuit Court of Appeals states the case as follows [R. 47-51]:

> "The plaintiff, the San Juan Trading Co., Inc., brought this action to recover from the Treasurer of Puerto Rico the sum of $26,400 paid under protest and collected as excise taxes due and levied upon 88,000 gross of 144 boxes each of uncolored square stick matches packed in wooden outers or shucks containing not less than 25 but not more than 50 sticks per box, brought by the plaintiff into Puerto Rico from the City and State of New York, to be disposed of in Puerto Rico. The said matches had originally been produced in Sweden and had been imported into the United States after August 5, 1935.
>
> The Treasurer levied and collected the tax under the provisions of subdivision 7 of Section 16 of Act No. 85, approved by the Legislature of Puerto Rico, August 20, 1925 (commonly known as the Internal Revenue Law of Puerto Rico) as amended by Act No. 146, approved May 9, 1938.[2] In substance, insofar

[2] Judge Mahoney here quotes in the margin to his opinion (R. 48) subdivision 7 of Section 16 of the Internal Revenue Law of Puerto Rico as amended by Act No. 146, May 9, 1938; Appendix hereto, *infra*, pp. 41-47.

as here relevant, the subsection taxes uncolored round stick matches (when packed in a wooden box containing not less than 25 nor more than 50 matches) at 10 cents per gross of 144 boxes while uncolored square stick matches packed in the same way are taxed at 30 cents per gross. Matches packed in other than wooden boxes, regardless of whether round or square, are taxed the same, a difference in taxation only being made dependent on whether the box contained not less than 25 nor more than 50 matches or whether it had less than 25 or more than 50. Paper or cardboard, wooden, and sperm or wax matches were also classified for different rates of taxation. By Act No. 14, approved September 9, 1938, the statute was amended to tax wooden matches, whether round or square, packed in wooden boxes containing less than 25 or more than 50 matches. These had been left untaxed in the previous Act.

Plaintiff and defendant stipulated that the only wooden matches produced in Puerto Rico are round stick matches made by the Pan American Match Company, a Puerto Rican corporation; that the only other round stick matches sold in Puerto Rico are made in the continental United States and recently in Sweden; that the round matches are die-cut from prepared blocks of soft "White Pine", whereas square matches are severed directly from sheets of hardwood known as "Aspen"; that the cost to Swedish manufacturers of producing round stick matches is at present greater than that of producing square stick matches, though it cannot be determined whether it will remain so; and that the retail price for both Swedish and Puerto Rican matches is one cent per box.

The plaintiff challenged the validity of subdivision 7 of Section 16, *supra*, on the grounds that by unwarrantedly discriminating between round and square matches, the subdivision violates the rights secured to the plaintiff by the V and XIV Amendments to the Constitution of the United States, and Section 2 (par. 1) of the Organic Act of Puerto Rico (39 Stat. 951 (1917)) in that it deprives the plaintiff of its property without due process of law and denies it the

equal protection of the laws; contravenes Article VI of the Reciprocal Commercial Trade Agreement entered into between the United States and the Kingdom of Sweden and signed May 25, 1935 (49 Stat. 3759) exempting imports from Sweden from internal revenue taxes other or higher than those payable on like articles of national or other foreign origin, and also violates the provisions of Section 2 (par. 22) of the Organic Act of Puerto Rico, *supra*, at page 952, to the effect that taxation in the Island shall be uniform, and the provisions of Section 3 thereof as amended (44 Stat. 1418 (1927)) that there must be no discrimination between articles imported from the United States or foreign countries and similar articles of domestic origin.

The defendant admitted levying and collecting the tax under the statute set out above but denied that the statute violated the Constitution of the United States, the Organic Act of Puerto Rico, or the Reciprocal Commercial Trade Agreement. He further alleged that round and square stick matches have different characteristics of a substantial nature sufficient to justify the Legislature of Puerto Rico in classifying them differently for purposes of taxation.

The case having been submitted on the pleadings and the stipulation, the District Court held that the classification which made a distinction between round and square matches was unreasonable in that it bore no substantial or fair relation to the object or purpose of a revenue act and that it violated the XIV Amendment of the Constitution of the United States, the Organic Act of Puerto Rico, and the Reciprocal Commercial Trade Agreement. It further held, however, that the invalidation of the discriminatory features of subdivision 7 of Section 16 did not void the entire section but only the amount of the invalid discrimination of 20 cents per gross. It, therefore, allowed the plaintiff a refund in that amount, and entered judgment in the sum of $17,600 with interest thereon from the date of filing of the suit to the date of payment.

From this judgment, both plaintiff and defendant appeal. The plaintiff alleges that the District Court

was in error in holding that it was subject to a tax of 10 cents per gross and in refusing to order a refund of the entire 30 cent tax collected from it. The defendant claims that the court erred in invalidating the said subdivision, asserting that the classification is reasonable; that the said subdivision does not violate the Constitution of the United States, the Organic Act of Puerto Rico, or the Reciprocal Commercial Trade Agreement, and that the District Court should not have allowed the plaintiff any refund whatever."

QUESTIONS PRESENTED

The important question here presented is of the power of the insular Legislature to encourage local manufacturing interests by a differentiation in the rates of the excise taxes in favor of the soft wood matches produced in Puerto Rico [and in the mainland of the United States] as well as [recently] in Sweden, as against the hard wood matches produced by a different manufacturing process solely in Sweden and imported into the mainland United States and shipped to Puerto Rico. The soft wood match is produced by punching it out of soft wood, which results in a round match. This process, with the machinery for it, appears to have been developed in the United States mainland and introduced into Puerto Rico, thus creating a manufacturing industry in the Island, where manufacturing industries are greatly needed, and where it has been the long-established policy of the Legislature to foster them because of the Island's great over-population and its excess of labor supply and lack of manufacturing industries.

The Swedish hard wood match, on the other hand, is produced by another process. It is made by stamping the matches out of thin sheets of hard wood veneer. That results in a square match. It appears that the Swedish manufacturers making this hard wood square match have not so far developed the machinery or process to enable

them to make a round match as cheaply as the square match; although it is stipulated [R. 18],

> "that such manufacturers can not now determine whether they will ultimately be able to produce round-stick matches at a cost not greater than that of producing square-stick matches".

In other words, the apparent effect of the excise tax differentiation in favor of the round [soft wood] match, as against the square match, is not to prevent competition by the Swedish manufacturers; but only to encourage them to change their processes, and to go into the process of manufacturing the round match, a form of industry in which the local Puerto Rican manufacturers may have a competitive opportunity; whereas, in the hard wood [square match] manufacturing field, the Swedish manufacturers enjoy a practical monopoly.

The ultimate question is therefore of the power of the Legislature of Puerto Rico so to exercise its powers of classification in local taxation as to give the local industry this competitive opportunity in the soft wood [round] match field, as against the practical monopoly enjoyed by the foreign manufacturers in the hard wood [square] match field.

The legislative background and policy is stated more at length in our Supporting Brief (*infra*, pp. 14-18).

As above indicated the legislation is assailed on several grounds: (1) As violating the guarantees of "due process" and "equal protection of the laws" and of "uniformity in taxation" of the Constitution and the Organic Act; (2) As violative of the *proviso* added to section 3 of the Organic Act by the "Butler Act" of Congress, March 4, 1927 (44 Stat. 1418, *Appendix, infra*, p. 41),

> "That no discrimination be made between the articles imported from the United States or foreign countries and similar articles produced or manufactured in Porto Rico";

and (3) As violative of the similar guarantee given by United States in the "Reciprocal Commercial Trade Agreement" with Sweden of May 25, 1925 (*Appendix, infra,* p. 55) which provides for the admission of Swedish products to the United States,

> "exempt from all internal taxes, fees, charges, or exactions, other or higher than those payable on like articles of national origin or any other foreign origin".

TREASURER'S POSITION

The Treasurer's position on behalf of the Government of Puerto Rico is that: (1) Such a classification of different types of manufacturing processes, for the purpose of encouraging the type of process that may successfully be carried on by local industry, is within the broad local legislative powers of the Legislature of Puerto Rico, and is not violative of the guarantees either of due process, of equal protection of the laws, or of uniformity in taxation; (2) That the *proviso,* added by the Butler Act to section 3 of the Organic Act, against "discrimination" between articles imported from the United States or foreign countries and *"similar articles"* produced or manufactured in Puerto Rico does not override the Legislature's power of classification among different types of articles or processes of manufacture, but that the word "similar" is only intended to refer to articles within the same classification in any group; (3) That the words *"like products," "like articles"* in the trade agreement with Sweden indicate no further restriction, but are practically synonymous with the words *"similar articles"* in the Butler Act; and, like those words, do not indicate any purpose on the part of the treaty making power to override the Legislature's general power of classification for tax purposes, but only to place the foreigner on a basis of exact equality with the United States citizen in relation to each classification; and (4) That, in any event, this plaintiff-

respondent, a domestic corporation of Puerto Rico, is not in position to invoke the protection of the trade agreement with a foreign country.

OPINIONS OF THE COURTS BELOW

As stated, the District Court overruled the Treasurer on all these points, and struck down the legislation on all these grounds [R. 18-32]. In the Circuit Court of Appeals JUDGE MAHONEY, agreeing with the District Court, likewise sustained [R. 47-57] the attack on all points, *except* the "uniformity in taxation" clause, which he does not consider violated [R. 52] "if the classification between round and square matches is valid"; whereas JUDGE MAGRUDER [R. 59-62] "With some misgivings" concurred only in the result, agreeing with the Treasurer that the tax classification here involved does not violate the guarantees of due process or the equal protection of the laws [without specifically referring to the requirement of "uniformity in taxation" which, however, it may be inferred from his opinion that he does not consider violated]; and he "questions" "whether the provisions of" the Swedish Trade Agreement "can be invoked by the present plaintiff, a Puerto Rican corporation"; but he does consider that the Butler Act *proviso* narrows the powers of the Legislature of Puerto Rico in classification for taxation more closely than do the requirements of "due process" or of "equal protection of the laws."

JUDGE PETERS, on the other hand, dissenting, as above quoted (R. 62; *ante*, pp. 2-3), holds the legislation within the power of the Legislature, and valid. He agrees with Judge Magruder that it is not violative of section 2 of the Organic Act [the "due process" and the "equal protection of the laws" and "uniformity in taxation" clauses], and that the Swedish Trade Agreement cannot be here invoked by this domestic corporation of Puerto Rico. But he disagrees with Judge Magruder [as well as with Judge Mahoney] as to the Butler Act *proviso*. He does

not consider that it further narrows the Legislature's powers of classification for taxation.

The Treasurer submits that Judge Peters' opinion is correct; that the legislation is valid; and that accordingly the decision should be reviewed by this Court, and that the judgments of the lower courts should be reversed.

STATUTES

The legislation here directly assailed, section 7 of section 16 of Act No. 85 of the Legislature of Puerto Rico, approved August 20, 1925, the "Internal Revenue Law of Puerto Rico" (Laws of 1925, p. 584) as amended by Act No. 146 approved May 9, 1938 (Laws of 1938, p. 325), and further by Act No. 14, September 9, 1938, is in the Appendix, *infra*, pp. 41-47; as are likewise other pertinent Constitutional and statutory provisions, federal and insular, including the pertinent portions of the trade agreement with Sweden (*Appendix, infra,* pp. 41, 47-55).

REASONS FOR GRANTING THE WRIT

This case presents important questions of federal law that have not been and it is believed should be decided by this Court. They are of particular importance to the Government and to the people of Puerto Rico in the development of manufacturing industries in that island Territory. The case likewise presents conflicts of opinion among the Judges of the Circuit Court of Appeals for the First Circuit, where each of the three Judges felt it his duty to write a separate opinion, and no two of them were in agreement on all the essential points. Furthermore, it is believed that the prevailing result and the decisions of the Circuit Court of Appeals, and of the District Court, are in conflict with applicable decisions of this Court as to the extent of the local legislative powers of the Legislature of Puerto Rico, particularly *People of Puerto Rico* vs. *Shell Co.*, 302 U. S. 253, 261, 262; *People*

of Puerto Rico vs. *Rubert Hermanos, Inc.*, 309 U. S. 543, 547; and *Bacardi Corporation of America* vs. *Domenech, Treasurer* [No. 21, decided December 9, 1940; United States Law Week for December 10, 1940, Vol. 9, pp. 4056, 4059]; and also such decisions as *Madden* vs. *Kentucky*, 309 U. S. 83, 88, as to the "freedom of classification" of the legislative power in matters of taxation; and *Cincinnati Soap Co.* vs. *United States*, 301 U. S. 308, 320, as to its power to lay taxes with a view to encouraging domestic industry; and that other decisions of this Court were misapplied, particularly [R. 57] *Bethlehem Motors Co.* vs. *Flynt*, 256 U. S. 421; *Brimmer* vs. *Rebman*, 138 U. S. 78; and *Minnesota* vs. *Barber*, 136 U. S. 313; as well as *Askren* vs. *Continental Oil Co.*, 252 U. S. 444, 450, and *Chalker* vs. *Birmingham & N. W. Ry. Co.*, 249 U. S. 522.

The following ultimate questions among those here presented are believed to be of particularly broad general importance:

(1) Whether, as JUDGE MAHONEY holds in effect in his separate opinion in the Circuit Court of Appeals [R. 51-56], the Legislature of Puerto Rico is without power under the "due process" clause to exercise its powers of classification in taxation for the encouragement of a type of manufacturing process adapted to develop local manufacturing industries in the Island, as against other processes not so adapted. As to this question, Judge Mahoney stands alone in the Circuit Court of Appeals. Both of the other Judges, Judges Magruder [R. 59] and Peters [R. 62] disagree with him here, and uphold the power of the Legislature so far as this question is concerned;—that is, so far as the "due process" and the "equal protection of the laws" as well as the "uniformity in taxation" clauses go.

(2) Whether, as JUDGES MAHONEY and MAGRUDER hold [R. 56; 60-62], the *proviso* added to section 3 of the

Organic Act by the Butler Act of 1927, forbidding discrimination between "similar articles" imported into the Island and those produced or manufactured there, further narrows the Legislature's powers of classification for taxation, so as to have the result that, as Judge Mahoney phrases it [R. 56, *supra*]:

> "A classification which would not be considered so unreasonable as to deny the equal protection of the laws can still be invalid"

under this *proviso* of the Butler Act. JUDGE PETERS does not agree with this [R. 62]; and this question does not appear to have been expressly considered by the District Court [R. 20-32].

(3) Can the Swedish Trade Agreement be availed of by a domestic corporation of Puerto Rico such as the plaintiff-respondent in this case? The District Court impliedly so held, without expressly discussing this question [R. 30-32], as did likewise JUDGE MAHONEY in the Circuit Court of Appeals [R. 54-55]; but on the other hand the majority of the Circuit Court judges, JUDGE MAGRUDER [R. 59] as well as JUDGE PETERS [R. 62], hold with the Treasurer on this point that the Trade Agreement cannot be invoked "by the present plaintiff, a Puerto Rican corporation".

(4) In any event [in case the plaintiff-respondent, a domestic corporation of Puerto Rico, were in position to invoke it here], does the phrase *"like products"* or *"like articles"* in the Swedish Trade Agreement further narrow the Legislature's powers of classification in taxation; or does it not, on the other hand, like the phrase *"similar articles"* in the Butler Act *proviso*, merely prevent discrimination within the same group of articles, and not affect the legislative power to classify articles or types of processes into groups for tax purposes.

It will be observed that the only question upon which any two of the judges of the Circuit Court of Appeals reached an

agreement adverse to the contentions of the Treasurer, this petitioner, and agreed that the legislation must be struck down, is the question numbered "(2)" above. Upon that point JUDGE MAGRUDER "with some misgivings" [R. 59, *supra*] concurred with JUDGE MAHONEY that the effect of the Butler Act *proviso* to section 3 of the Organic Act is so to narrow the Legislature's powers of classification for tax purposes that, as above quoted [R. 56, *supra*], "A classification which would not be considered so unreasonable as to deny the equal protection of the laws can still be invalid" under this Butler Act *proviso,* THAT IS THE ONLY POINT UPON WHICH THE LEGISLATION WAS STRUCK DOWN,— by the consenting majority of two Judges,—PRESIDING JUDGE MAGRUDER here agreeing with JUDGE MAHONEY, over the dissent of JUDGE PETERS.

On all the other points JUDGES MAGRUDER and PETERS agreed in rejecting the attacks, and upholding the legislation.

This one question of the interpretation of the Butler Act proviso to section 3 of the Organic Act is, therefore, the primary question in the case. It is an important question of Federal law which has not been and should be decided by this Court. It is believed that the majority opinion on this question is clearly wrong; and that this question, particularly, should be considered by this Court, as well as the other questions above indicated.

Wherefore, it is respectfully requested that this petition for a writ of certiorari be granted.

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BRIEF IN SUPPORT OF PETITION

OPINIONS BELOW

The opinion of the District Court of the United States for the District of Puerto Rico [R. 18-34] is not officially reported. The opinions of the several Judges of the Circuit Court of Appeals [JUDGE MAHONEY, R. 47-59; JUDGE MAGRUDER, R. 59-62; JUDGE PETERS, R. 62] are reported in 114 F. (2d) 969, 976, 977 (*Advance Sheets*).

JURISDICTION

The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code of the United States, as amended by the Act of February 13, 1925, c. 229, 43 Stat. 938.

The judgment of the Circuit Court of Appeals was entered October 16, 1940 [R. 47, 62].

QUESTIONS PRESENTED

The questions presented are stated in the Petition (*ante*, pp. 6-8, 10-13).

STATUTES INVOLVED

These are indicated in the Petition (*ante*, p. 10), and pertinent parts including those of the Swedish Trade Agreement, are set out in the Appendix (*infra*, pp. 41-55).

LEGISLATIVE BACKGROUND AND POLICY

The established policy of the Legislature of Puerto Rico to encourage local industries in the Island, and particularly local manufacturing industries, has been manifested by a series of acts.

FIRST. Acts authorizing exemption of new industries from local taxation for a period of years: Act No. 92 of 1917 ("Promulgated, March 31, 1919, in virtue of a

decision of the Supreme Court of Porto Rico of March 11, 1919"); with its successor Acts: Act No. 16 of May 20, 1925, Laws of Puerto Rico, 1925, pp. 132-134; Act No. 10 of May 12, 1927, Laws of Puerto Rico, 1927, Second Special Session, pp. 430-432; Act No. 40 of April 25, 1930, Laws of Puerto Rico, 1930, pp. 314-316; and Act No. 94 of May 14, 1936, Laws of Puerto Rico, 1936, pp. 494-496. [Pertinent parts in the Appendix, *infra*, pp. 47-54.]

SECOND. "Exposition of Motives", in Act No. 138 of May 15, 1937 [Laws of Regular Session, 1937, pp. 296-301], "To promote the industry of tourism in Puerto Rico", that [*ibid*, at p. 297]:

> "It is undeniable that aside from the direct benefits that the immediate expenditures made by the tourists who visit the Island, there may be among the persons who visit us and have the opportunity to learn about our economic problems, *some whose interest in establishing new industries in the Island may be aroused*, and this would necessarily affect the general welfare of the country and favor especially the needy classes who are demanding more opportunities to earn their living" (*Italics supplied*).

THIRD. All of the foregoing statutes, and many others, indicate that the purpose of fostering new industries in the Island is among the purposes that are constantly foremost in the thought of the insular Legislature.

FOURTH. The court will take judicial notice, moreover, of the well known conditions in the Island indicating the outstanding need to foster new industries, particularly new manufacturing industries. The Island has a total area of around 2,198,000 acres, including everything, mountain tops and all; an area of cultivable land not exceeding 1,500,000 acres; a population by the 1935 census conducted by the Puerto Rico Reconstruction Administration of 1,723,534 people; and a present [preliminary

1940 census] population of 1,869,245 people.[3] That is to say considerably more than one person for every acre of cultivable land. The Island is predominantly agricultural; more than two-thirds of the population, estimated, is classed as "rural population".[4] Total shipments from the Island for the fiscal year ending June 30, 1936, were $99,133,924, out of which some 90 per cent, were of agricultural products, including sugar.[5] The second largest item of shipments, needlework, $14,275,785, is almost entirely handwork, by women in their homes, and is rapidly decreasing [down from a peak of upwards of $21,000,000 in 1936[6]] due to a number of causes beyond local control.

There is much unemployment, estimated at around 300,000 unemployed [Governor Leahy's statement before Wages and Hour Administrator, January 9, 1940; Hearings on Apparel Industry].

Under these circumstances the urgent need,—the almost desperate need,—of the introduction of new manufacturing industries amply explains,—and more than justifies, —the established policy of the Legislature in this regard.

FOURTH. It was with this background of long established legislative policy, and of urgent public need in the Island, to foster new local manufacturing industries, that the

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[3] Governor's Report, 1940, p. 10. *Confer*, Statement of the Governor of Puerto Rico, January 3, 1939, before the United States Committee for Reciprocity Information; copied, as to the part pertinent here, in the Social Security Hearings before the House Committee on Ways and Means, 76th Congress (Vol. II, pp. 1626, 1627).

[4] 72.3%; Opinions of insular Supreme Court [JUSTICE TRAVIESO], *in People of Puerto Rico* vs. *Rubert Hermanos, Inc.* ("500 Acre case"); Transcript of Record in this Court, Case No. 582 at October Term, 1939, p. 294; referring to Puerto Rico Reconstruction Census of 1935.

[5] Governor's Annual Report, 1936, pp. 154, 158-159.

[6] *Confer* Footnote 3, *ante*.

Legislature in 1938 amended the classification of matches for the purposes of the excise tax here in question, subdivision 7 of Section 16 of the local Internal Revenue Law, so as to foster the manufacture of that type of matches (soft wood, round matches) which it had been indicated by experience could perhaps be commercially produced in the Island as well as elsewhere ["Agreed Statement of Facts", *supra*, R. 17-18], as against the manufacture of the other type (the hardwood, square match) which, from commercial experience, apparently could only be profitably produced abroad [or, at least, as experience had shown, was being marketed only by the representatives of the Swedish manufacturers, manufactured in Sweden, and not in this country.

[Classification of matches for the purposes of the excise tax under that subdivision 7 of Section 16 of the law had been in effect in various forms since 1925 (Acts, Appendix, *infra*, pp. 41-47). The only substantial innovation in 1938 was to so change the classification as to favor the manufacture of that type (the soft wood, round match) which commercial experience was apparently showing could be profitably produced in Puerto Rico as well as in the United States mainland, as well as abroad, and an opportunity thereby opened up for building a new local manufacturing industry.] There is nothing in the record to indicate that the round match may not likewise be produced in Sweden or elsewhere in the world equally as well as the square match now being produced by the great Swedish company; although, apparently, it may require some change of machinery on their part, with which they have not yet sufficiently experimented. [The "Agreed Statement of Facts" says R. 18]:

> "that such manufacturers can not now determine whether they will ultimately be able to produce round-stick matches at a cost not greater than that of producing square-stick matches".

There is nothing to indicate that "such manufacturers" may not be able to do so, and thus to accommodate themselves to competitive conditions with local Puerto Rican manufacturers on an equal basis under this law.

STATEMENT

A statement of the case is in the Petition (*ante,* pp. 3-6).

SPECIFICATION OF ERRORS TO BE URGED

These are indicated under the heading "Questions Presented" and "Reasons for Granting the Writ" (*ante,* pp. 6-8 and pp. 10-13).

SUMMARY OF ARGUMENT

The trend of the argument is summarized under the headings "Questions Presented" and "Reasons for Granting the Writ" (*ante,* pp. 6-8 and pp. 10-13) in the Petition, and in the "Subject-Index" preceding the Petition (*ante,* pp. i-vii).

ARGUMENT

FIRST

There is here no violation of the "due process" "equal protection of the laws", or "uniformity in taxation" clauses of the Constitution or of Section 2 of the Organic Act for Puerto Rico.

POINT I

Upon this branch of the case a majority of the Judges of the Circuit Court of Appeals agree with our position. PRESIDING JUDGE MAGRUDER and JUDGE PETERS agree in rejecting the attacks made upon the legislation on these grounds. [JUDGE MAGRUDER, R. 59; JUDGE PETERS, R. 62; *ante, Petition,* pp. 2-3, 9, 11].

POINT II

The Legislature of Puerto Rico possesses substantially all of the local legislative powers of a State legislature, in all the respcts here involved, including the police powers.

This Court said in *People of Puerto Rico* vs. *Shell Co., supra,* 302 U. S. 253, 260-262:

> "1. Section 14 of The Foraker Act, passed April 12, 1900, c. 191, 31 Stat. 77, 80, provided that the statutory laws of the United States, not locally inapplicable, should have the same force and effect in Puerto Rico as in the United States, with certain exceptions not material here. Section 27 (p. 82) provided 'That all local legislative powers hereby granted shall be vested in a legislative assembly * * *.' And by Section 32 (p. 83-84), it was provided that that the legislative authority 'shall extend to all matters of a legislative character not locally inapplicable * * *'. These various provisions are continued in force by Sections 9, 25 and 37 of the Organic Act of March 2, 1917, c. 145, 39 Stat. 951. These provisions do not differ in substance from the various provisions relating to the powers of the organized and incorporated continental territories of the United States, in respect to which this court said in *Clinton* vs. *Englebrecht,* 13 Wall. 434, 441, that the theory upon which these territories have been organized 'has ever been that of leaving to the inhabitants all the powers of self-government consistent with the supremacy and supervision of National authority, and with certain fundamental principles established by Congress'; and in *Hornbuckle* vs. *Toombs,* 18 Wall. 648, 655-656, we said: 'The powers thus exercised by the Territorial legislatures are nearly as extensive as those exercised by any State legislature'. See also *Cope* vs. *Cope,* 137 R. S. 682, 684, where this court, speaking of this typical general provision contained in the Utah Organic Act, said that, with the exceptions noted in the provision itself, 'the power of the Territorial legislature was apparently as plenary as that of the legislature of a State.'' In *Maynard* vs. *Hill,* 125 U. S. 190, 204,

the essential similarity of the various provisions in respect of the powers of territorial legislatures was pointed out, and it was said that what were 'rightful subjects of legislation' was to be determined 'by an examination of the subjects upon which legislatures had been in the practice of acting with the consent and approval of the people they represented.'

"The grant of legislative power in respect of local matters, contained in Section 32 of the Foraker Act and continued in force by Section 37 of the Organic Act of 1917, is as broad and comprehensive as language could make it. The primary question posed by the challenge to the validity of the act under consideration is whether the matter covered by the act is one 'of a legislative character not locally inapplicable.' * * *

"2. The aim of the Foraker Act and the Organic Act was to give Puerto Rico full power of local self-determination, with an autonomy similar to that of the states and incorporated territories. *Groner* vs. *Standard Dredging Co.*, 224 U. S. 362, 370; *Porto Rico* vs. *Rosaly y Castillo, supra*" [227 U. S. 270], "p. 274. The effect was to confer upon the territory many of the attributes of *quasi*-sovereignty possessed by the states—as, for example, immunity from suit without their consent. *Porto Rico* vs. *Rosaly, supra.* By those acts, the typical American governmental structure, consisting of the three independent departments — legislative, executive and judicial—was erected. 'A body politic'—a commonwealth—was created. 31 Stat. 79, Sec. 7, c. 191. The power of taxation, the power to enact and enforce laws, and other characteristically governmental powers were vested. And so far as local matters are concerned, as we have already shown in respect of the continental territories, legislative powers were conferred nearly, if not quite, as extensive as those exercised by the state legislatures."

See also, to the same effect *People of Puerto Rico* vs. *Rubert Hermanos, supra,* 309 U. S. 543, 547, and the recent decision, at the present term, December 9, 1940, in

No. 21, *Bacardi Corporation* vs. *Domenech,* Treasurer, United States Law Week, Vol. 9, pp. 4056, 4059.

POINT III

In the exercise of the police power in local legislation the State legislatures exercise all of the unlimited powers of the English Parliament, except in so far as their powers may be expressly limited by the State constitution or by the Federal Constitution or by Congressional legislation pursuant to Constitutional power.

> "* * * the States possess all the powers of the Parliament of England, except such as have been delegated to the United States or reserved by the people."
> *Munn* vs. *Illinois,* 94 U. S. (4 Otto) 113, 124 WAITE, CH. J.)

POINT IV

The police power, as habitually exercised by the State legislatures, extends to the exactment of laws to promote good order and the general welfare of society, as well as the safety, health and morals of the community.

It extends, particularly, to the enactment of tax laws with a view to the general welfare of the community, and to foster local industry.

[*Confer, infra,* Point VII-H, p. 26].

POINT V

In the case of Puerto Rico, the Congress has by the Organic Act (Secs. 25 and 37, *supra,* Act of March 2, 1917, 39 Stat. 951, 958, 964; Appendix, *infra,* p. 41) delegated all of its own local legislative powers with respect to that Island to the insular Legislature, except as otherwise prescribed or limited by that Act or other acts of the Congress.

A. It follows that *the Legislature* of Puerto Rico, *in legislating locally* for the government and the people of Puerto Rico *can do anything which the Congress itself could do,* except in so far as otherwise limited by the Or-

ganic Act or other acts of Congress. *Haavik vs. Alaska Packers Association,* 263 U. S. 510, 514; *Rafferty vs. Smith, Bell & Co.,* 257 U. S. 226, 232; *United States vs. Heinszen & Co.,* 206 U. S. 370, 385-386; *People vs. Shell Co., supra,* 302 U. S. 253, 259, *et seq.*

B. Hence **The Legislature of Puerto Rico** in legislating, as in the Acts here in question, in the exercise of its police powers, for the public welfare of Puerto Rico, the protection or development of its local industries, or for the welfare of its people, **is restrained only by the Fifth Amendment, and by the provisions of the Organic Act, or other pertinent acts [or treaties] of Congress, if any.**

POINT VI

The act here assailed does not violate the due process clause of the Fifth Amendment, nor the provisions of the first clause of Section 2 of the Organic Act guaranteeing due process, equal protection of the laws, and uniformity in taxation.

The plaintiff company's contention is, and the District Court held, with which JUDGE MAHONEY [alone] agreed in the Circuit Court of Appeals, that the Act here assailed violates the provision of the Fifth Amendment,

> "nor shall any person * * * be deprived of life, liberty, or property, without due process of law,"

and that of the first clause of Section 2 of the Organic Act for Puerto Rico (c. 145, 39 Stat. 951, substantially an embodiment of the "due process" clause of the Fifth Amendment):

> "Sec. 2. That no law shall be enacted in Porto Rico which shall deprive any person of life, liberty, or property without due process of law, or deny to any person therein the equal protection of the laws."

The District Court and JUDGE MAHONEY are believed to have been plainly in error here.

POINT VII

In approaching this question several basic considerations are to be kept in mind.

A. As above pointed out (*ante,* Points II, III, IV, pp. ....), the Legislature of Puerto Rico in enacting these statutes was *exercising its legislative local police powers and local taxing powers* for the welfare of the community and for the protection and encouragement of its local industries. In the exercise of those powers it was clothed with all of the powers of a State legislature, and with all of the powers which the Congress could itself exercise in such local legislation,—substantially all of the broad powers of the English Parliament in this respect.

B. It was,—as appears not only from the Acts in question, but also from the series of Acts beginning in 1917, designed to encourage new local industries in Puerto Rico, the various Acts authorizing the Public Service Commission to exempt new industries from local taxation for a period of years, as well as the "*Exposition of Motives*" in the Act of May 15, 1937, relating to "Tourism" in Puerto Rico [*ante,* "Legislative Background and Policy", pp. 14-18], intending to exercise these legislative police powers and local taxing powers with a view to protect the welfare of the community and to protect and develop local industries, in accordance with its long-established settled legislative policy, by enacting legislation to protect and foster the local match manufacturing industry then being newly established in the Island [company organized in 1935 and production actually begun in February, 1939; "Agreed Statement of Facts", R. 17], and, manifestly, to discourage monopoly and to check the growth of financial absenteeism in the Island.

C. This encouragement of a local manufacturing industry, in accordance with the long-established policy of the Legislature, was certainly a legitimate legislative pur-

pose. *Cincinnati Soap Co.* vs. *United States, supra,* 301 U. S. 308, 320.

D. This legislative purpose to protect and foster local industry and particularly new industries in this densely populated Island where the need to encourage such industries is so manifest [*Confer, ante,* pp. 14-18], and to avoid the increase and growth of financial absenteeism, is quite in line with recent developments of legislative policy in a number of States of the Union.

For example, there are the statutes of **CALIFORNIA** discriminating against beer produced anywhere outside of that State [so-called "foreign beer", although perhaps produced in some other State of the Union]; **MINNESOTA,** discriminating against any liquors produced outside of that State [by forbidding bringing any such liquors into the State containing more than 25% of alcohol "ready for sale without further processing", *unless* bearing brands registered in the United States Patent Office], **PENNSYLVANIA,** discriminating against [a] beer produced outside of the borders of the State, as well as [b] sales by corporations having non-resident stockholders and officers [by means of license fees discriminating against distributors of beer produced outside of the States, and by forbidding sales of beer without a license, and forbidding a license to any corporation "unless all its officers and directors, and fifty-one percent of its stockholders have been residents of the State for the period of at least two years"].

And see also the statutes listed *infra,* in sub-paragraph "N" of this Point (pp. 28-29).

Cases involving the validity of the statutes of those three States, respectively, have recently come before the Supreme Court, and the statutes have been sustained. *State Board* vs. *Young's Market Co.,* 299 U. S. 59; *Mahoney vs. Triner Corp.,* 304 U. S. 401; *Premier-Pabst Co. vs. Grosscup,* 298 U. S. 226. **While those statutes relate to the**

manufacturing of liquors, yet the underlying principle is the same; viz., the fostering and protection of local home industry.

E. The mere fact of the existence of such a wide-spread sentiment and legislative policy among the States of the Union, along lines of thought quite analogous to the policy of the Legislature of Puerto Rico in enacting these statutes, to protect and encourage the growth of local manufacturing industries, as well as to protect them from foreign competition, is in itself evidence of the reasonableness of such a policy, and affords strong grounds for a presumption of the constitutionality of the statutes here assailed.

This Court, speaking by the CHIEF JUSTICE, in *West Coast Hotel Co. vs. Parrish,* 300 U. S. 379, 399, has said:

> "The adoption of similar requirements by many States evidences a deep-seated conviction both as to the presence of the evil and as to the means adapted to check it. **Legislative response to that conviction cannot be regarded as arbitrary or capricious,** and that is all we have to decide. Even if the wisdom of the policy be regarded as debatable and its effects uncertain, still the legislature is entitled to its judgment." (*Emphasis supplied.*)

F. Similarly, the adoption by the Legislature of Puerto Rico of the taxing statute here involved, for the purpose of encouraging a new local manufacturing industry, in accordance with the long-established policy of the Legislature to encourage such new industries, and the vital need for them in the Island, is indicative, in the words of the Chief Justice, in *West Coast Hotel Co.* vs. *Parrish,* above quoted, of *"a deep-seated conviction"* as to the need of such legislation,—a deep-seated persistent conviction throughout the Island.

G. The right to enter into a business, or to carry it on,—and particularly the right of a corporation of the Island, organized under its local laws, its own creature,—like the right to contract,—is not an absolute or unqualified

right; but is one of those forms of the "liberty" guaranteed by the due process clause, which, like other forms of liberty, is as was said in *West Coast Hotel Co.* vs. *Parrish, supra,* 300 U. S. 379, 391,

> "necessarily subject to the restraints of due process, and regulation which is reasonable in relation to its subject and is adopted in the interests of the community is due process".

H. In the exercise of its taxing powers, as well as in the exercise of its legislative police powers, the Legislature may act with a view to the welfare of the community; and thus, as here, to protect and foster local industry.

This Court has recently said, in *Cincinnati Soap Co.* vs. *United States, supra,* 301 U. S. 308, 320:

> "Congress, in passing the legislation here under consideration, is not forbidden to balance these respective probabilities. The tax itself, it is said, was imposed for the purpose of protecting certain industries in this country; and it is challenged on that ground. **That Congress has power to levy a tax with the collateral purpose of thereby protecting the industries of the United States is no longer open to doubt.** *Hampton & Co.* v. *United States,* 276 U. S. 394, 411."

As above pointed out, the delegation by the Congress to the Legislature of Puerto Rico of "all local legislative powers" empowers the Legislature to legislate as broadly in this respect for the benefit of the public welfare, in its local tax legislation, as the Congress could itself do.

I. In enacting such tax laws for the public welfare and to foster local industry, as with all other laws enacted in the exercise of the police power for the public welfare, *the Legislature is primarily the judge of the necessity of the enactment. West Coast Hotel Co.* vs. *Parrish, supra,* 300 U. S. 379, 398; *Nebbia* vs. *New York,* 291 U. S. 502, 537, 538.

Thus this Court said in the *West Coast Hotel Co.* case, *supra,* 300 U. S. 379, 397-398:

> "In *Nebbia* v. *New York*, 291 U. S. 502 * * * we again declared * * * ; that 'with the wisdom of the policy adopted, *with the adequacy or practicability of the law enacted to forward it*, the *courts are both incompetent and unauthorized to deal*'; that 'times without number we have said that *the legislature is primarily the judge of the necessity* of such an enactment, that every possible presumption is in favor of its validity, and that though the court may hold views inconsistent with the wisdom of the law, it may not be annulled unless palpably in excess of legislative power.' " (*Italics supplied.*)

L. *The Legislature possesses wide powers of classification* in relation to the objects and persons to be affected by its legislation. The "equal protection" clause of Section 2 of the Organic Act for Puerto Rico [substantially like the similar clause in the Fourteenth Amendment, which does not extend to Puerto Rico] does not substantially change or enlarge the effect of the "due process" clause of the Fifth Amendment [which is likewise embodied in Section 2 of the Organic Act]. Taken together, these clauses simply require that State [or Territorial] laws apply alike to all persons similarly situated. They do not prevent, or further limit, classification by the Legislature. *Currin* vs. *Wallace*, 306 U. S. 1, 14; *Borden's Farm Products Co.* vs. *Ten Eyck*, 297 U. S. 251, 261-264; *Nebbia* vs. *New York, supra*, 291 U. S. 502; *Borden's Farm Products Co.* vs. *Baldwin*, 293 U. S. 194, 210; *Barrett* vs. *State of Indiana*, 229 U. S. 26.

M. There is a strong presumption in favor of the validity of the legislative action. He who assails the constitutionality of a statute must be prepared to show that it is *clearly* unconstitutional. The burden is upon him "to make a convincing showing". *Townsend vs. Yeomans*, 301 U. S. 441, 451.

As the Circuit Court of Appeals phrased it in *Sancho Bonet, Treasurer of Puerto Rico vs. Bacardi Corporation,* 109 F. (2) 57, 65[7]:

> "* * * *doubt is not enough,* that unconstitutionality must clearly appear in order to warrant us in holding legislation void." (*Italics supplied.*)

The rule has been re-stated innumerable times. *Confer,* e.g., *Green vs. Frazier,* 253 U. S. 253.

N. The broad and varied powers of the Legislature in the classification and regulation of industry, are illustrated in a wide range of cases. Examples are:

Florida—Miami Laundry Co. vs. Florida Dry Cleaning & Laundry Board, 134 Fla. 1, 8-13; 183 Sou. 759. Fixing minimum prices for laundry and dry cleaning.

Florida—Mayo, Commissioner vs. The Polk Co., 124 Fla. 534 (169 Sou. 41); appeal dismissed for want of a substantial federal question, 299 U. S. 507, 508. "Bond and License Law" of 1935 requiring licenses for citrus fruit dealers and canners.

Georgia—Townsend vs. Yeomans, 301 U. S. 441. Maximum charges handling and selling leaf tobacco.

Illinois—Munn vs. Illinois, 94 U. S. 113. Regulating prices to be charged by grain elevators.

New York—Nebbia vs. People of New York, supra, 291 U. S. 502. Regulating milk prices.

New York—Hegeman Farms Corp. vs. Baldwin, 293 U. S. 163. Milk prices.

New York—United States vs. *Rock Royal Co-op., Inc.* 307 U. S. 533, 562 *et seq.* Act and order of Secretary of Agriculture sustained, al-

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[7] Recently reversed; but on wholly different grounds, *Bacardi Corp. vs. Domenech, Treas., supra,* No. 21 at the present term, December 9, 1940; U. S. Law Week, Dec. 10, 1940, pp. 4056, 4059.

though specifically exempting co-operatives, and applicable to independent canners only.

North Dakota—Brass vs. State of North Dakota, 153 U. S. 391. Maximum charges for storage.

Pennsylvania—Milk Control Board of Pennsylvania vs. Eisenberg Farm Products, 306 U. S. 346. Milk prices.

Washington [State]. *West Coast Hotel Co. vs. Parrish, supra,* 300 U. S. 379. Minimum wages for women.

POINT VIII

It is in the light of the foregoing principles that the general rule is to be approached.

A. **The general rule is,** as it was stated in the *West Coast Hotel Co.* case, *supra,* 300 U. S. 379, 391, that:

> "regulation which is reasonable in relation to its subject and is adopted in the interests of the community is due process".

B. In determining whether the remedy chosen by the Legislature in the exercise of its broad discretionary powers so far exceeds that which may be allowed to be "reasonable" in relation to its subject, or is so widely astray from any apparent public purpose that it cannot be said to be "adopted in the interests of the community", all of the foregoing principles must be borne in mind. As was said by Mr. Justice Roberts speaking for the Court in *Borden's Farm Products Co.* vs. *Ten Eyck, supra,* 297 U. S. 251, 263:

> "Judicial inquiry does not concern itself with the accuracy of the legislative finding but only with the question whether it so lacks any reasonable basis as to be arbitrary. *Standard Oil Co. v. Marysville,* 279 U. S. 582, 586-587".

And as this Court has likewise said:

"The court does not sit as a board of revision to substitute its judgment for that of the Legislature". (*St. Joseph Stock Yards Co. v. United States* 298 U. S. 38, 51).

POINT IX

Considered in the light of the foregoing established principles, the act of the Legislature of Puerto Rico here assailed does not violate the "due process" or the "equal protection" clause, nor the rule of uniformity in taxation. It is a valid enactment of the local legislative power.

WHEREIN DOES IT OFFEND?

A. The District Court says (Opinion, R. 29):

> "It is conceded that round-stick matches are die-cut from previously prepared blocks of soft, straight grained 'white pine' known as 'cork pine', whereas the square-stick matches are severed directly from sheets of wood veneer of a hardwood known as Aspen, and that the machinery used for the production of round-stick matches is different from that used for the production of square-stick matches, and that the cost to produce round-stick matches to a manufacturer engaged at present in the production of square-stick matches would be greater, although it cannot be determined if ultimately the cost of producing round-stick matches may be as great as that of producing square-stick matches, *but*, as above stated, *these differences, in the opinion of this Court do not warrant any distinct classification between round and square-stick matches for the purpose of taxation, as they have no apparent substantial, or fair relation to the object or purpose of an act to secure revenue*".

The Court expresses likewise a similar positive opinion that "there cannot be any reasonable basis" for the other classifications in the statute, with relation to matches, and the various ways in which they are packed (R. 29-30).

B. *That is all that he says upon the question. That is his decision.* He lists (R. 25-28) quite a number of decisions

which he considers in point; but he makes no analysis of the basic rules involved, to be gathered from the decisions.

C. *The District Court,* without analysis of the underlying rules to be deduced from the decisions *sets up his own individual opinion in opposition to that of the elected representatives of the people in the Legislature upon the questions of fact and of policy here involved.*

D. But the members of the Legislature, presumably familiar with local business and social conditions in the Island, have expressed a different opinion, by the enactment of this Act, in accordance with their established legislative policy, reaching back nearly a quarter of a century, to 1917, to encourage new industries in the Island [*ante,* pp. 14-18], and particularly new manufacturing industries.

Who shall say that the Legislature is not entitled to its opinion on this question; or that its opinion is so merely foolish and unreasonable that it may be disregarded by the courts;—that is to say, that it is so "unreasonable" that "no reasonable man" can be imagined as believing in it.

E. This Court has recently said (*Madden* vs. *Kentucky,* 309 U. S. 83, 87-88, 93, decided January 29, 1940 [FRANKFURTER, J.], sustaining a statute of the State of Kentucky imposing on its citizens an annual *ad valorem* tax on their deposits in banks outside of the State, at a higher rate than that imposed on their deposits in banks located within the State:

> "I. *Classification.*—The broad discretion as to classification possessed by a legislature in the field of taxation has long been recognized.[4] This Court fifty years ago concluded that 'the Fourteenth Amendment was not intended to compel the State to adopt an iron rule of equal taxation,'[5] and the passage of

time has only served to underscore the wisdom of that recognition of the large area of discretion which is needed by a legislature in formulating sound tax policies. Traditionally classification has been a device for fitting tax programs to local needs and usages in order to achieve an equitable distribution of the tax burden. It has, because of this, been pointed out that in taxation, even more than in other fields, legislatures possess the greatest freedom in classification.[6] Since the members of a legislature necessarily enjoy a familiarity with local conditions which this Court cannot have, the presumption of constitutionality can be overcome only by the most explicit demonstration that a classification is a hostile and oppressive discrimination against particular persons and classes.[7] The burden is on the one attacking the legislative arrangement to negative every conceivable basis which might support it.[8] * * *.

"In the states, there reposes the sovereignty to manage their own affairs except only as the requirements of the Constitution otherwise provide. Within these constitutional limits the power of the state over taxation is plenary. An interpretation of the privileges and immunities clause which restricts the power of the states to manage their own fiscal affairs is a matter of gravest concern to them.[23] It is only the emphatic requirements of the Constitution which properly may lead the federal courts to such a conclusion.

"[4] *New York Rapid Transit Corp.* v. *New York,* 303 U. S. 573, and cases there cited.

"[5] *Bell's Gap R. R.* v. *Pennsylvania,* 134 U. S. 232, 237.

"[6] *Citizens' Telephone Co.* v. *Fuller,* 229 U. S. 322, 329.

"[7] See the opinion of Mr. Justice Brandeis in *Louisville Gas & Electric Co.* v. *Coleman,* 277 U. S. 32, 42, 46-47.

"[8] *Lindsley* v. *Natural Carbonic Gas Co.,* 220 U. S. 61 78-79.

"[23] *Twining* v. *New Jersey,* supra, 92 [211 U. S. 78]".

SECOND

This plaintiff respondent, San Juan Trading Company, Inc., a domestic corporation of Puerto Rico, is not in position to invoke the provisions of the Reciprocal Commercial Trade Agreement with Sweden.

POINT X

On this branch of the case also the majority of the Judges of the Circuit Court of Appeals agree with our position, and agree in rejecting the plaintiff-respondent's attack on the legislation on this ground [JUDGE MAGRUDER, R. 59; JUDGE PETERS, R. 62; *ante, Petition,* pp. 2, 9, 12].

The trade agreement is a contract with Sweden for the benefit of that government and its nationals. It cannot be availed of by a domestic corporation of Puerto Rico, in any event, to increase its rights beyond those given it under the laws of the *quasi*-sovereign jurisdiction under which it is organized, and from which it derives all its powers and rights, or beyond the rights and privileges secured to it by those laws and by the Constitutional provisions and the provisions of the Organic Act of the Congress guaranteeing to it the benefits of "due process", "equal protection of the laws", and "uniformity in taxation". *Cf. The Head Money Cases,* 112 U. S. 580, 597-598.

THIRD

The phrase "similar articles" in the *proviso* added by the Butler Act to section 3 of the Organic Act for Puerto Rico prohibiting "discrimination" "between the articles imported from the United States or foreign countries and similar articles produced or manufactured in Porto Rico" [*Appendix, infra,* p. 41], does not further narrow the powers of the Legislature to classify subjects of taxation, beyond the restrictions imposed by the "due process", "equal protection of laws", and "uniformity in taxation" clauses of the Constitution and of section 2 of the Organic Act. It simply

places articles "imported" into the Island, whether from the mainland of the United States or from foreign countries, on a par with those "produced or manufactured" in the Island. It does nothing more. It does not give to such "imported" products, or to their importers, any greater rights or privileges than those accorded to the local products or to local citizens of the United States and the Island.

POINT XI

This is the only question in the case upon which a majority of the Judges of the Circuit Court are against our position. As above pointed out (*Petition, ante,* pp. 2, 9, 11-13), on this point PRESIDING JUDGE MAGRUDER, "with some misgivings" [R. 59], concurs in JUDGE MAHONEY's opinion that the Butler Act *proviso* actually does result in a further narrowing of the Legislature's powers of classification for taxation, beyond the requirements of "due process", "equal protection of the laws", and "uniformity in taxation"; and that, as JUDGE MAHONEY phrases it [R. 56; *ante,* Petition, p. 12],

> "A classification which would not be considered so unreasonable as to deny the equal protection of the laws can still be invalid as forbidden discrimination against foreign matches in favor of domestic ones".

JUDGE PETERS dissents. As above quoted (*Petition, ante,* pp. 2-3), he rejects this attack upon the legislation also, and thinks the legislation valid [R. 62].

POINT XII

No line of demarkation is pointed out as to how far this additional narrowing of the legislative power is to go, if this Butler Act *proviso* to Section 3 is to be considered as thus further narrowing the legislative powers of classification beyond the restrictions imposed by the "due process", "equal protection of the laws", and "uniformity in taxation" clauses.

A. The only suggested possible line of demarkation is indicated in the following paragraph in JUDGE MAHONEY'S opinion [R. 57]:

> "Where a statute in terms is non-discriminatory but its avowed intent and necessary effect is to favor local products over similar foreign products, it is the duty of the courts to declare the statute void. *Bethlehem Motors Co.* vs. *Flynt*, 256 U. S. 421 (1921); *Brimmer* v. *Rebman*, 138 U.S. 78 (1891); *Minnesota* v. *Barber*, 136 U.S. 313 (1890); *cf. Askren* v. *Continental Oil Co.*, 252 U. S. 444, 450 (1920); *Chalker* vs. *Birmingham & N. W. Ry., supra* [249 U. S. 522]. The cited cases indicate that if this were not done, provisions against discrimination could be easily circumvented with a consequent undesirable increase in trade barriers which the provisions were designed to prevent."

But this paragraph of JUDGE MAHONEY'S opinion really simply begs the question. He refers to "avowed intent and necessary effect" "to favor local products over *similar* foreign products". ***But the whole question really is whether or not they are "similar" within the meaning of the proviso.*** It is believed manifest that if the Legislature, in the proper exercise of its Constitutional powers, and subject to the restrictions imposed upon it by the "due process", "equal protection of the laws" and "uniformity in taxation" clauses, has actually classified the products in different classes, **then those products may not properly be said to be "similar" products** within the meaning of the *proviso. In other words, it all comes back to the same question in the end.* If they are really "similar" products,—that is to say, if there is really no substantial ground whatever for differentiation between them,—then there is likewise no ground for classification between them under the Constitutional requirements of due process, equal protection of the laws, and uniformity in taxation; and any legislative attempt to set up a factitous or wholly unsubstantial

differentiation for purposes of attempted classification falls under those prohibitions. If on the other hand, there actually is any such substantial difference, of any kind, that the legislative classification placing them in different groups for taxation purposes can be sustained under those Constitutional clauses, then by the same token they are not "similar" products within the meaning or the intent of the Congress in this Butler Act *proviso*. It is as long as it is broad .

B. The attempt to give such effect to the word "similar" in the Butler Act *proviso* as to create a further indefinite narrowing of the legislative powers of classification would simply lead into a field of uncertainty; and, it might almost be said, of mere guess work; and to the embarkation of the courts upon uncharted seas. In such cases it is submitted that the view of JUDGE PETERS in his dissenting opinion here [R. 62] is clearly sound, that

> "assuming that different minds might reasonably take different views on that point, I think the opinion of the Legislature should prevail."

C. No authorities are cited by JUDGE MAGRUDER on this branch of the case. The decisions of this Court cited by JUDGE MAHONEY (R. 57) do not appear to support him. To the contrary, as noted in our "Reasons For Granting the Writ" (Petition, *ante*, p. 11), they appear to be misapplied here. They are *Bethlehem Motors Co.* vs. *Flynt*, 256 U. S. 421, dealing with [pp. 422-424, 425-426] *discrimination between the parties* making or selling, in favor of local parties; *Minnesota* vs. *Barber*, 136 U. S. 313 [322-323] concerning meat not slaughtered within the State, but otherwise not differentiated in any way from locally slaughtered meat; and *Brimmer* vs. *Rebman*, 138 U. S. 78 [82-83], meat not slaughtered within one hundred miles; together with a reference to *Askren* vs. *Continental Oil Co.*, 252 U. S. 444, 450 and *Chalker* vs.

Birmingham, Northwestern & Ry. Co., 249 U. S. 522, equally wide of the mark here.

There is nothing in any of those decisions to support JUDGE MAHONEY'S *theory* that, as he puts it (R. 56) as above quoted:

> "A classification which would not be considered so unreasonable as to deny the equal protection of the laws can still be invalid as forbidden discrimination against foreign matches in favor of domestic ones".

Neither those decisions nor, as it is believed, any others can be found to support to that theory. To the contrary, this Court's decisions appear to uphold the rule that *such statutory provisions—and also corresponding treaty provisions*, such as that in the reciprocal trade agreement with Sweden before the Court in this case,—*are all alike intended, not to give preference to the foreigner, but simply to place the foreigner and the American citizen on a plane of exact parity.* In other words, that such provisions do not further narrow, in favor of the foreigner and beyond the rights of the local citizen, the restrictions of the requirements of due process, equal protection of the laws, and uniformity in taxation upon the Legislature's power of classification of the objects of taxation.

FOURTH

The phrases *"like products", "like articles"* in the Reciprocal Trade Agreement with Sweden,—even if that agreement could be here availed of by this respondent, a domestic corporation of Puerto Rico,—**do not further narrow the Legislature's power of classification of the objects of taxation, nor change the situation in any way.**

POINT XIII

The Trade Agreement with Sweden does not change the situation in any way.

A. The trade agreement simply places citizens and corporations of Sweden on a par with those of the United States. It gives them the same right to insist on the protection of the rules of due process, equal protection of the laws, and uniformity of taxation. It does nothing more. It does not give them greater rights or privileges than those accorded to our own citizens.

B. The provision of Article VI of the Trade Agreement upon which the respondent, the San Juan Trading Company, here relies, is simply (Appendix, infra, p. 55):

> "Articles the growth, produce or manufacture of the United States of America or Sweden, shall, after importation into the other country, be exempt from all internal taxes, fees, charges or exactions, other or higher than those payable on Like Articles of national origin or any other foreign origin."

C. The foregoing provision, aimed at the prevention of discrimination, is, in so far as it relates to commerce between the United States mainland and Puerto Rico, and to the sending to Puerto Rico from the mainland of articles which, as in the present case, have originally been imported into the mainland from the Kingdom of Sweden, to be construed as *in pari materia* with the *proviso* added by the Congress, by the Butler Act of March 4, 1927, 44 Stat. 1418, to Section 3 of the Organic Act for Puerto Rico (*ante*, pp. 33-37; *infra*, p. 41),

> "*Provided*, That no discrimination be made between the articles imported from the United States or foreign countries and similar articles produced or manufactured in Porto Rico".

D. Manifestly, the phrase "Like Articles" used in the trade agreement means substantially the same thing as the phrase "similar articles" used in the *proviso* to Section 3 of the Organic Act, and is to be construed in the same manner. Neither phrase was intended to deprive the Legislature of the power of classification within the limitations of due process, equal protection of the laws, and the rule of uniformity in taxation.

CONCLUSION

The Act of the Legislature of Puerto Rico here assailed is valid. The judgment of the District Court striking it down was wrong, as was likewise the divided court affirmance resulting from the variant opinions of the Judges of the Circuit Court of Appeals. For the "Reasons For Granting the Writ" stated in the Petition it is believed that this case should be reviewed by this Court, and that the judgments of the lower courts should be reversed.

Respectfully submitted,

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APPENDICES

APPENDIX I

CONSTITUTIONAL AND STATUTORY PROVISIONS

CONSTITUTION:

Fifth Amendment.

No person shall be * * * deprived of life, liberty, or property, without due process of law; * * * .

FEDERAL:

The Organic Act for Puerto Rico, Act of March 2, 1917, c. 145, 39 Stat. 951:

Section 2.—That no law shall be enacted in Porto Rico which shall deprive any person of life, liberty, or property without due process of law, or deny to any person therein the equal protection of the laws.

Section 3.—(*As amended by Act of Congress, approved March 4, 1927.*) * * * * .

And it is further provided, That the internal-revenue taxes levied by the Legislature of Porto Rico in pursuance of the authority granted by this Act on articles, goods, wares, or merchandise may be levied and collected as such legislature may direct, on the articles subject to said tax, as soon as the same are manufactured, sold, used, or brought into the island; *Provided*, That no discrimination be made between the articles imported from the United States or foreign countries and similar articles produced or manufactured in Porto Rico.

Section 25.—That all local legislative powers in Porto Rico, except as herein otherwise provided, shall be vested in a Legislature * * * designated "the Legislature of Porto Rico".

Section 37.—That the legislative authority herein provided shall extend to all matters of a legislative character not locally inapplicable, * * * .

PUERTO RICO:

Pertinent parts of Internal Revenue Law:

Act No. 85, "Internal Revenue Law of Porto Rico", approved August 20, 1925 (Laws of 1925, pp. 584, 590, 596), provides in pertinent part:

To provide revenues for The People of Porto Rico by levying certain sale taxes and taxes for the manufacture, use, sale and consumption of certain products and by the levying of certain excise and license taxes on certain occupations, industries or businesses; to impose certain penalties; to repeal the laws in force providing for excise and license taxes, and for other purposes.

Be it enacted by the Legislature of Porto Rico:

Section 1.—This Act shall be known as the "Internal Revenue Law of Porto Rico."

* * * * *

Section 16.—There shall be collected and paid, once only, a internal-revenue tax on each of the following articles:

* * * * *

14. *Matches.*—On all matches, whether sulphur, safety, friction, fuse or whatever name known, sold, transferred, used or consumed in Porto Rico, a tax of twenty (20) cents on every gross or fraction of gross boxes, the contents of which are not less than twenty-five nor more than one hundred sticks per box.

When matches are boxed in boxes containing less than twenty-five or more than one hundred sticks each, a tax of four (4) cents shall be paid on each thousand matches or fraction thereof.

Act. No. 17, amending the Internal Revenue Law of Rico, as amended, approved June 3, 1927 (Laws of 1927, Special Sessions, pp. 458, 360, 464), provides in pertinent part:

Section 1.—That Sections 4, 8, 12, 13, 14, 16, 62, 74, 77, 83 and 84 of Act No. 85, approved August 20, 1925, are hereby amended to read as follows:

* * *

"Section 16.—There shall be collected and paid, once only, an internal-revenue tax on each of the following articles:

"7. *Matches.*—On all matches, whether sulphur, safety, friction, fuse or by whatever name known, sold, transferred, used, consumed or introduced into Porto Rico, a tax of thirty (30) cents on every gross

or fraction of gross of boxes, the contents of which are not less than twenty-five nor more than one hundred sticks per box.

"When matches are boxed in boxes containing less than twenty-five or more than one hundred sticks each, a tax of six (6) cents shall be paid on each thousand matches or fraction thereof."

Act. No. 83, amending the Internal Revenue Law of Puerto Rico, as amended, approved May 6, 1931 (Laws of 1931, pp. 504, 506-508), provides in pertinent part:

Section 16.—There shall be collected and paid, once only, as an internal-revenue tax on the following articles sold, transferred, used or consumed in, or introduced into Porto Rico, and on the articles comprised in this section of the law:

* * *

"7. *Matches.*—On all matches, whether sulphur, safety, friction or fusee, or by whatever nawe known, sold, manufactured, transferred, used, or consumed in, or introduced into Porto Rico, a tax of five (5) cents on every thousand matches or fraction of a thousand."

Act No. 108, amending the Internal Revenue Law of Puerto Rico, as amended, approved May 15, 1936 (Laws of 1936, pp. 566, 568), provides in pertinent part:

"7. *Matches.*—On all matches, whether sulphur, safety, friction or fuses, or by whatever name known, sold, manufactured, transferred, used or consumed in, or introduced into, Puerto Rico, a tax of thirty (30) cents for each gross of boxes or fraction thereof, the contents of which are not less than twenty-five (25) nor more than fifty (50) matches per box. When the matches contained in a box are less than twenty-five (25) or more than fifty (50) sticks, a tax of five (5) cents shall be paid for each thousand matches or fraction thereof."

Act No. 146, amending the Internal Revenue Law of Puerto Rico, as amended, approved May 9, 1938 (Laws of 1938, pp. 325-327) provides:

To amend subdivision 7 of Section 16 of Act No. 85, entitled "An Act to provide revenues for The People of Porto Rico by levying certain sale taxes and taxes for the manufacture, use, sale and consumption of certain products and by the levying of certain excise and license taxes on certain occupations, industries or businesses; to impose certain penalties; to repeal the laws in force, providing for excise and license taxes, and for other purposes," approved August 20, 1925, as amended by Act No. 10, of July 16, 1926; Act No. 17, of July 3, 1927; Act No. 18, of April 19, 1928; Act No. 36, of April 23, 1928; Act No. 74, of May 6, 1930; Act No. 83, of May 6, 1931; Act No. 84, of May 7, 1931; Act No. 89, of May 11, 1931; Act No. 18, of April 25, 1932; Act No. 11, of July 21, 1932; Joint Resolution No. 13, of April 18, 1933; Act No. 11, of August 22, 1933 and Act No. 108, of May 15, 1936 and for other purposes.

Be it enacted by the Legislature of Puerto Rico:

Section 1.—Subdivision 7 of Section 16 of Act No. 85, entitled "An Act to provide revenues for The People of Porto Rico by levying certain sale taxes and taxes for the manufacture, use, sale and consumption of certain products and by the levying of certain excise and license taxes on certain occupations, industries, or businesses; to impose certain penalties; to repeal the laws in force providing for excise and license taxes, and for other purposes," approved August 20, 1925, as amended by Act No. 10, of July 16, 1926; Act No. 17, of July 3, 1927; Act No. 18, of April 19, 1928; Act No. 36, of April 23, 1928; Act No. 74, of May 6, 1930; Act No. 83, of May 6, 1931; Act No. 84, of May 7, 1931; Act No. 89 of May 11, 1931; Act No. 18, of April 25, 1932; Act No. 11, of July 21, 1932; Joint Resolution No. 13, of April 18, 1933; Act No. 11, of August 22, 1933, and Act No. 108, of May 15, 1936, is hereby amended to read as follows:

"7. *Matches*: On matches, whether sulphur, safety, friction, or fuses, or by whatever name known, sold, manufactured, transported, transferred, used or consumed in, or brought into, Puerto Rico in boxes with

wooden shucks, containing not less than twenty-five (25) nor more than fifty (50) matches per box, there shall be levied and collected an excise tax as follows:

"(a) Matches having uncolored square sticks, thirty (30) cents a gross of one hundred and forty-four boxes;

"(b) Matches having colored, fancy square sticks, thirty-six (36) cents per gross of one hundred and forty-four boxes;

"(c) Matches having uncolored round sticks, ten (10) cents a gross of one hundred and forty-four boxes.

"(d) Matches having colored, fancy round sticks, fifteen (15) cents a gross of one hundred and forty-four boxes.

"When the matches are in boxes with other than wooden outers or shucks, containing not less than twenty-five (25) matches nor more than fifty (50) matches per box, there shall be levied and collected an excise tax of thirty-six (36) cents a gross of one hundred and forty-four boxes; when the box contains less than twenty-five (25) matches or more than fifty (50) matches there shall be levied and collected an excise of six (6) cents on each thousand matches or fraction of a thousand.

"On paper or cardboard matches in boxes of twenty (20) matches each, there shall be levied and collected an excise tax of five (5) cents on each thousand matches or fraction of a thousand. Books containing more than twenty (20) matches or less than twenty (20) matches, shall pay an excise tax of six (6) cents on each thousand matches or fraction of a thousand.

"On wooden matches sold in the form of books, there shall be levied and collected an excise tax of six (6) cents on each thousand matches or fraction of a thousand.

"On sperm or wax matches there shall be levied and collected an excise tax of five (5) cents on each thousand matches or fraction of a thousand."

Section 2.—All laws or parts of laws in conflict herewith are hereby repealed.

Section 3.—This Act, being of an urgent character, shall take effect immediately after its approval.

Act No. 14, amending the Internal Revenue Law of Puerto Rica, as amended, approved September 9, 1938 (Laws of 1938, Special Session, pp. 42-46), provides:

Be it enacted by the Legislature of Puerto Rico:

Section 1.—Subdivision 7 of Section 16 of Act No. 85, entitled "An Act to provide revenues for The People of Porto Rico by levying certain sale taxes and taxes for the manufacture, use, sale and consumption of certain products and by the levying of certain excise and license taxes on certain occupations, industries or businesses, to impose certain pealties; to repeal the laws in force providing for excise and license taxes, and for other purposes", approved August 20, 1925, as amended by Act No. 10 of July 16, 1926; Act No. 17, of July 3, 1927; Act No. 18, of April 19, 1928; Act No. 36, of April 23, 1928; Act No. 74, of May 6, 1930; Act No. 83, of May 6, 1931; Act No. 84, of May 7, 1931; Act No. 89, of May 11, 1931; Act No. 18 of April 25, 1932; Act No. 11, of July 21, 1932; Joint Resolution No. 13, of April 18, 1933; Act No. 11, of August 22, 1933; Act No. 108, of May 15, 1936; Act No. 146 of May 9, 1938; Act No. 205 of May 15, 1938; and Act No. 315, of May 15, 1938, is hereby amended to read as follows:

"7. *Matches:* On matches, whether sulphur, safety, friction, or fusee, or by whatever name known, sold, manufactured, transported, transferred, used, or consumed in, or brought into, Puerto Rico in boxes with wooden shucks, containing not less than twenty-five (25) nor more than fifty (50) matches per box, there shall be levied and collected an excise tax as follows:

"(a) Matches having uncolored square sticks, thirty (30) cents a gross of one hundred and forty-four boxes;

"(b) Matches having colored fancy square sticks, thirty-six (36) cents per gross of one hundred and forty-four boxes;

"(c) Matches having uncolored round sticks, ten (10) cents a gross of one hundred and forty-four boxes;

"(d) Matches having colored, fancy round sticks, fifty (50) cents a gross of one hundred and forty-four boxes.

"When the matches are in boxes with other than wooden outers or shucks, containing not less than twenty-five (25) matches nor more than fifty (50) matches per box, there shall be levied and collected an excise tax of thirty-six (36) cents a gross of one hundred and forty-four boxes.

"When the matches are packed in boxes made of wood or of any other material and containing less than twenty-five (25) or more than fifty (50) matches each, a tax of six (6) cents shall be paid on each thousand matches or fraction of a thousand.

"On paper or cardboard matches in books of twenty (20) matches each, there shall be levied and collected an excise tax of five (5) cents on each thousand matches or fraction of a thousand. Books containing more than twenty (20) matches or less than twenty (20) matches, shall pay an excise tax of six (6) cents on each thousand matches or fraction of a thousand.

"On wooden matches sold in the form of books, there shall be levied and collected an excise tax of six (6) cents on each thousand matches or fraction of a thousand.

"On sperm or wax matches there shall be levied and collected an excise tax of five (5) cents on each thousand matches or fraction of a thousand."

Section 2.—All laws or parts of laws in conflict herewith are hereby repealed.

Section 3.—This Act, being of an urgent character, shall take effect immediately after its approval.

Pertinent parts of "new industries" Acts.

Act No. 92, "Promulgated" March 31, 1919; Appendix to Vol. II of the Laws of Porto Rico, 1917, p. 14.

To protect new industries in Porto Rico by exempting them from taxes for a period not exceeding ten years as the Public Service Commission may determine.

Be it enacted by the Legislature of Porto Rico:

Section 1.—That the following shall be understood to be the new industries or factories in Porto Rico:

1. Those which on a small or large scale are absolutely new because none other manufacturing products of the same class, whether or not the raw material is produced in Porto Rico, such as cement, cotton fabrics, wools, silk, hemp, sisal, sanseveria, rope, majagua, oils, paper, china, crystal, glass and other similar factories, including container and package factories not existing in Porto Rico, has been established or exists in Porto Rico.

Section 2.—That such industries, factories or mills shall be exempt from all taxes for a period not exceeding ten years, as the Public Service Commission may determine, which said period shall be reckoned from and after the complete installation of the factory or mill.

Section 3—That all laws or parts of laws in conflict herewith are hereby repealed.

Section 4—That this Act shall take effect ninety days after its approval.

Promulgated, March 31, 1919, in virtue of a decision of the Supreme Court of Porto Rico of March 11, 1919".

Act No. 16, approved May 20, 1925 (Laws of Puerto Rico, 1925, pp. 132-134).

AN ACT

To amend Section 2 of Act. No. 92, entitled 'An Act to protect new industries in Porto Rico by exempting them from taxes for a period not to exceed ten years, as the Public Service Commission may determine,' promulgated March 31, 1919, by virtue of a decision of the Supreme Court of Porto Rico of March 11, 1919, and for other purposes.

Be it enacted by the Legislature of Porto Rico:

Section 1.—That Section 2 of Act No. 92, entitled 'An Act to protect new industries in Porto Rico by

exempting them from taxes for a period not to exceed ten years, as the Public Service Commission may determine', promulgated March 31, 1919, by virtue of a decision of the Supreme Court of Porto Rico of March 11, 1919, is hereby amended to read as follows:

"Section 2.—That such industries, factories or mills shall be exempt from all taxes for a period not to exceed ten years, as the Public Service Commission may determine, which said period shall be reckoned from the complete installation of the factory or mill; *Providing,* That when the new industry consists in submitting to a new purifying or refining process, a product manufactured in the country, the exemption from taxation shall not include such manufactured product nor the apparatus and establishments employed in obtaining it, and shall apply only to the new process of refining or purifying and to its apparatus, establishments and products; *And, provided, further,* That such exemption shall not include incomes taxes assessable under the law."

Section 2.—That all laws or parts of laws in conflict herewith are hereby repealed.

Section 3.—That this Act shall take effect ninety days after its approval.

Acts and Resolutions of the Second Special Session of the Eleventh Legislature of Porto Rico, April 25, to May 8, 1927. Laws of Puerto Rico, 1927; Act No. 10, approved May 12, 1927, pp. 430-432.

AN ACT

To amend Section 2 of Act No. 92 promulgated March 31, 1919, by virtue of a decision of the Supreme Court of Porto Rico dated March 11,1919, entitled 'An Act to protect new industries in Porto Rico by exempting them from taxes for a period of not to exceed ten years, as the Public Service Commission may determine', amended by Act No. 16, approved May 20, 1925, and for other purposes.

Be it enacted by the Legislature of Porto Rico:

Section 1. That Section 2 of Act No. 92 of the Legislature of Porto Rico, promulgated March 31, 1919, by virtue of a decision of the Supreme Court of Porto Rico dated March 11, 1919, entitled 'An Act to protect new industries in Porto Rico by exempting them from taxes for a period not to exceed ten years, as the Public Service Commission may determine', as amended by Act No. 16, approved May 20, 1925, is hereby amended and shall be understood to be drafted in the following form:

"Section 2.—That such industries, factories or mills shall be exempt from all taxes other than the internal-revenue tax on sales, use or consumption and the assessments under the Workmen's Accident Compensation Act, for a period not to exceed ten years, as the Public Service Commission may determine, which period shall be reckoned from the complete installation of the factory or mill; *Provided,* That when the new industry consists in submitting to a new purifying or refining process a product manufactured in the country, the exemption from taxation shall not include such manufactured product nor the apparatus and establishments employed in obtaining it, and shall apply only to the new process of refining or purifing and to its apparatus, establishments and products; *And provided, further,* That such exemption shall not include income taxes assessable under the law, except when the application for a declaration that such industry is a new one shall have been filed with the Public Service Commission prior to May 20, 1925, date on which this Act was amended."

Section 2.—All laws or parts of laws in conflict herewith are hereby repealed.

Section 3—This Act shall take effect ninety days after its approval.

Act No. 40, approved April 25, 1930 (Laws of Puerto Rico, 1930, pp. 314-316).

AN ACT

To protect new industries in Porto Rico by exempting them from taxes for a period not to exceed ten years as the Public Service Commission may determine, and for other purposes.

Be it enacted by the Legislature of Porto Rico:

Section 1.—New industries in Porto Rico shall be understood to be all such processes as, by transforming raw material, shall have as their object the preparation and production of articles of commerce, either manufactured by hand or by machinery, the preparation or production of which has not previously taken place in Porto Rico or the means of preparing or producing which are new in Porto Rico.

Section 2.—That said new industries and their buildings, machinery, materials, franchises, etc., and, in general, all the properties, rights and privileges belonging to said industries, which are necessary in their work and operation, shall be exempt from all taxes for a period not to exceed ten years, as the Public Service Commission may determine. Said term shall be counted from the time the industrial installation is completed; *Provided*, That such exemption shall not include the assessments under the Workmen's Compensation Act; *And Provided, further*, That municipalities are hereby authorized to grant a similar exemption from municipal license and excise taxes to such industries as are previously declared new industries by the Public Service Commission, for a term not to exceed the term granted by said Commission; *Provided*, That all such industries as have been declared new industries, application for which declaration was made under Act No. 92, promulgated March 31, 1919, shall be exempt from the income tax from the time they were declared new industries. Such shall not be the case however, with those industries which applied for and were declared new industries while Act No. 16, approved May 20, 1925, was in force and those obtaining such declaraiton hereafter.

Section 3.—This Act shall be applicable to all in-

dustries established in Porto Rico which have already obtained an exemption from taxes; Provided, That when a natural or artificial person is granted an exemption from taxes on account of a new industry, the same privilege shall be enjoyed by other persons establishing in Porto Rico to carry on the same business or industry, provided the industrial installation is completed within the period of exemption granted to the first installation, and for the time remaining to said first industry for the extinction of its privilege.

Section 4.—All laws or parts of laws in conflict herewith are hereby repealed.

Section 5.—This Act shall take effect ninety days after its approval.

Act No. 94, approved May 14, 1936; Laws of Puerto Rico, pp. 494-496.

To define new industries in Puerto Rico; to protect the same; to exempt from taxes the new industries established in Puerto Rico; to determine the organizations authorized to grant such exemptions; to repeal Act No. 40, entitled "An Act to protect new industries in Porto Rico by exempting them from taxes for a period not to exceed ten years, as the Public Service Commission may determine, and for other purposes," approved April 25, 1930, and for other purposes.

Be it enacted by the Legislature of Puerto Rico:

Section 1.—Every person, partnership, organization, or corporation establishing a new industry in Puerto Rico shall be entitled, for the purpose of protecting and stimulating the establishment of new industries, to be granted tax exemption for such new industry by the corresponding organization.

Section 2.—For the purpose of this Act, *new industry* shall be understood to be all such methods of processing and manufacture, either by hand or by machinery, as, by transforming raw material, shall have as their object the production of articles of com-

merce never before produced in Puerto Rico; *Provided,* That such processed or manufactured products, properly finished, as may be utilized in connection with such industries, shall not be considered as raw material.

Section 3.—The Public Service Commission of Puerto Rico is hereby authorized to grant tax exemptions to all such new industries as may be established in Puerto Rico, and its decisions shall have the approval of the Governor of Puerto Rico. The new industries to which tax exemption is granted, as well as their buildings, machinery, materials and, in general, all such property, rights, and privileges owned by them as are essentially required for their work and operation, shall be exempt from taxes for such term as the Public Service Commission of Puerto Rico may prescribe, which term shall in no case exceed ten (10) years, and shall be counted from the date on which the industrial installation is completed; *Provided,* That such exemption shall not include income taxes to be paid by the person, firm, partnership, or corporation operating the new industry, or the assessments under the Workmen's Compensation Act. For the purpose of granting the exemption hereinbefore mentioned, the Public Service Commission shall hold such public hearings as it deems advisable and shall require of the petitioner the presentation of such evidence as will justify the grant requested; *Provided, further,* That no decision to exempt any new industry from taxes be valid unless duly approved by the Governor of Puerto Rico.

Section 4.—Whenever the Public Service Commission of Puerto Rico shall grant to a new industry the tax exemption provided in this Act, the municipality in which the said new industry is located shall be bound to acknowledge such exemption, and, in consequence, it shall not be allowed to collect from the said new industry any permit, license, or municipal excise taxes, or any other municipal tax, during the term of the exemption granted; *Provided,* That no exemption from the payment of municipal taxes, license fees, or excises shall be decreed without first hearing the affected municipality.

Section 5.—When an industry has been acknowledged as new in Puerto Rico and the exemption provided by this Act has been granted to it, tax exemption shall not be granted to any other similar industry established thereafter.

Section 6.—The grant of the tax-exemption privilege as provided by this Act shall not affect the payment of excises on alcoholic beverages when the new industry to which such exemption is granted is one engaged in the manufacture of alcoholic beverages. In this case, the owners of the industry shall be bound to pay the above-mentioned excises, notwithstanding the tax exemption granted to them.

Section 7.—Act No. 40, entitled "An Act to protect new industries in Porto Rico by exempting them from taxes for a period not to exceed ten years, as the Public Service Commission may determine, and for other purposes," approved April 25, 1930, is hereby expressly repealed; *Provided,* That all such rights as were acquired under the Act hereby repealed shall subsist for th full term for which they were granted; *And provided, further,* That all applications filed with the Public Service Commission from and after April 14, 1936, shall come under the provision of this Act.

Section 8.—All laws or parts of laws in conflict herewith are hereby repealed.

Section 9.—This Act, being of an urgent character, shall take effect immediately after its approval.

APPENDIX II

PERTINENT PORTIONS OF RECIPROCAL TRADE AGREEMENT WITH SWEDEN

Agreement between the United States of America and Sweden respecting reciprocal trade. Signed at Washington, May 25, 1935; approved by the President of the United States, June 12, 1935; ratified by the King of Sweden, June 15, 1935; instrument of approval and instrument of ratification exchanged at Stockholm, July 6, 1935; proclaimed July 8, 1935; effective, August 5, 1935.

ARTICLE I

The United States of America and Sweden will grant each other unconditional and unrestricted most-favored-nation treatment in all matters concerning the customs duties and subsidiary charges of every kind and in the method of levying duties, and further, in all matters concerning the rules, formalities and charges imposed in connection with the clearing of goods through the customs, and with respect to all laws or regulations affecting the sale or use of imported goods within the country.

Accordingly, natural or manufactured products having their origin in either of the countries shall in no case be subject, in regard to the matters referred to above, to any duties, taxes or charges other or higher, or to any rules or formalities other or more burdensome, than those to which the like products having their origin in any third country are or may hereafter be subject. * * *.

ARTICLE VI

Articles the growth, produce or manufacture of the United States of America or Sweden, shall, after importation into the other country, be exempt from all internal taxes, fees, charges or exactions other or higher than those payable on like articles of national origin or any other foreign origin. * * *

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IN THE

Supreme Court of the United States

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OCTOBER TERM, 1940

No. 648

MANUEL V. DOMENECH, Treasurer of Puerto Rico,
Petitioner,

vs.

SAN JUAN TRADING CO., INC.,
Respondent.

BRIEF FOR PETITIONER IN REPLY TO "SUGGESTIONS" IN OPPOSITION

WILLIAM CATTRON RIGBY,
Attorney for Petitioner.

GEORGE A. MALCOLM,
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Of Counsel.

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Respondent.

BRIEF FOR PETITIONER IN REPLY TO "SUGGESTIONS" IN OPPOSITION

I

The "Suggestions" of the Respondent and its supporting brief in opposition to the petition for certiorari really emphasize the importance of the "Reasons for granting the writ" stated in the Petition (pp. 10-13); particularly the reason which we numbered "(2)" [pp. 11-12, 12-13] relating to the ruling of the prevailing majority of the Circuit Court of Appeals that, as it was phrased by JUDGE MAHONEY [R. 56]:

> "A classification which would not be considered so unreasonable as to deny the equal protection of the laws can still be invalid",

under the prohibition against discrimination between "similar articles" (Sec. 3, Organic Act),—[or "like articles"; Trade Agreement with Sweden]; with which JUDGE MAGRUDER agreed only "with some misgivings"

[R. 59]; and from which JUDGE PETERS dissented [R. 62].

Respondent's "Suggestions" emphasize the fact that the same question arises with reference to the phrase "Like articles" in the Reciprocal Trade Agreement with Sweden. And, manifestly, it may arise in the construction of many treaties and statutes containing phrases of that kind,—"similar articles", "like articles", or kindred phraseology. The importance of the question is obvious. If, as the majority opinion in the Circuit Court of Appeals holds, the effect of such phrase, in a treaty or in a statute, is further to narrow the powers of a legislature, State or Territorial, in making classifications for tax purposes, beyond the constitutional limitations of "due process", "equal protection of the laws" and "uniformity in taxation", then it is of tremendous and far-reaching importance.

Counsel cite no previous decision supporting the holding. It is believed none can be found. It appears to be a new departure. As pointed out in our original Brief [pp. 35-37] in Support of our Petition for Certiorari, the cases cited [R. 57] in JUDGE MAHONEY'S opinion [*Bethlehem Motors Company* vs. *Flynt*, 256 U. S. 421; *Brimmer* vs. *Rebman*, 138 U. S. 78; *Minnesota* vs. *Barber*, 136 U. S. 313] do not support it.

II

The object or purpose of this insular taxing statute is not necessarily limited to the sole purpose of raising revenue. Manifestly, as pointed out in our original Petition for Certiorari and Supporting Brief (pp. 6-7, 14-18, 23-26) **the Legislature had in mind also the purpose of exercising its local police powers and local taxing powers in the classification of objects of taxation, for *the general welfare of the community*, and for the protection and encouragement of its local industries.** And [*original Supporting Brief*, Point VII-H, p. 26], ever since the decisions of this Court in *Hampton & Co.*

vs. *United States*, 276 U. S. 394, 411, and in *Cincinnati Soap Co.* vs. *United States*, 301 U. S. 308, 320, it is no longer open to doubt,

> "That Congress has power to levy a tax *with the collateral purpose of thereby protecting the industries* of the United States (*Italics supplied*).

With relation to local matters, that rule is equally applicable to the powers of the Legislature of Puerto Rico.

Insofar as any of the earlier cases cited by the Respondent ("Suggestions", "V", p. 14) might seem to indicate a narrower rule, they are to be considered as controlled by the later decisions of this Court in the *Hampton & Co.* and *Cincinnati Soap Co.* cases. See also *Madden* vs. *Kentucky*, 309 U. S. 83, 87-88, 93, cited and quoted in our original Supporting Brief (pp. 31-32).

III

It is immaterial that the statute here in question omitted to t x matches packed in boxes with wooden outers or shucks, containing less than twenty-five (25) matches or more than fifty (50) matches in the box. [Sub-division 7 of section 16 of the Internal Revenue Law of Puerto Rico, as amended by Act No. 146 of May 9, 1938; Appendix I to our Petition for Certiorari and Supporting Brief, pp. 43-45; original complaint of Respondent in the District Court, "*Second*", R. 6-7; Respondent's "Suggestions" in opposition here, p. 6 "(b)", and p. 18.]

The ordinary wooden box in universal use, in which matches are sold [whether "*square* stick" or "*round* stick", without any distinction or difference whatever in this respect, in commercial usage], is the little box containing from 25 to 50 matches. Taxation is a practical matter. The Legislature was taxing sales of packages in the ordinary commercial form, from the taxation of which

substantial revenue might be derived. Those packages were the ordinary wooden box containing 25 to 50 matches to the box, as well as paper or cardboard matches in books, and other ordinary commercial forms. **The Legislature was under no obligation to levy a tax on an unusual,—practically non-commercial,—form of package,** from which the Legislature might well determine that no substantial revenue was to be derived, worth the cost of collection.

It is not alleged (R. 6-7, *supra*), nor is it claimed in Respondent's "Suggestions", that there was in this omission by the Legislature any discrimination whatever against the square match or against the Respondent, or any manifestation of hostility whatever against any one. So far as this omission goes, the square match and its importers, such as the Respondent, are put on exact equality with the round match and its local manufacturers or importers. None of them are taxed at all on any sales of matches packed in wooden boxes containing less than 25, or more than 50, matches to the box,—that is to say on unusual, commercially negligible, packages.

It is well settled that the provision in Section 2 of the Organic Act of Puerto Rico, "That the rule of taxation shall be uniform", does not impose any requirement of *universality* in taxation,

> "unless there is a clearly hostile discrimination against certain persons or classes, not based upon any reasonable distinction". *Gallardo* vs. *Porto Rico Ry. Light & Power Co.* 18 F. (2d) 918, 923-925, quoting *Cooley's Constitutional Limitations* (5th Ed.) p. 638. And see also the other authorities there cited.

Whether, therefore, this omission on the part of the Legislature to tax wooden boxes of unusual non-commercial forms of less than 25 or more than 50 matches to the box was the result of oversight on the Legislature's part in enacting the amendatory statute, Act No. 146 of May

9, 1938 [as would seem to be indicated by the next amendatory statute, four months later, Act No. 14 of September 9, 1938, Appendix I to the Petition for Certiorari, pp. 46-47, which supplied this omission], or whether it was a deliberate legislative determination that it was not worth while to tax these unusual, commercially negligible, packages,—in either event it was within the Legislature's powers. There was no discrimination in it against any one. It is immaterial here for any purpose. All of the Judges of the Circuit Court of Appeals agree that there is no violation of the rule of unformity in taxation. [*Confer*, Petition for Certiorari, p. 2.]

IV

As pointed out in the Petition for Certiorari (p. 9), two of the three Judges of the Circuit Court of Appeals [JUDGE MAGRUDER agreeing here with JUDGE PETERS] agreed that the **Respondent here, a local corporation of Puerto Rico, is not in position to avail itself of the Trade Agreement with Sweden.** That is a contract for the benefit of the Swedish government and its nationals. Respondent cites no authorities to the contrary. The recent decision of this Court, to which it refers ("Suggestions", pp. 12, 13, 39) in *Bacardi Corporation* vs. *Domenech, Treasurer*, No. 21 at the present term of this Court, decided December 9, 1940, does not help it here. The situation there was wholly different. Not only was the petitioner there, the Bacardi Corporation of America, *not* a local domestic corporation of Puerto Rico [a Pennsylvania corporation], but moreover, as the District Court had there specifically found, its relations to its parent corporation, the Cuban company, *Compania Ron Bacardi, S. A.*, were such, and so close, that it was really merely the hand or *alter ego* of the Cuban company. Looking through the form to the substance, it was in effect the Cuban company itself that was there asserting its rights under the Trade-mark Convention

to which both Cuba and the United States were signatories.

And there was, of course, in that case, no question of the construction of any such phrase as "*similar articles*", or "*like articles*", or as to whether such a phrase in a treaty or act of Congress can have the effect of further narrowing the power of a State or Territorial legislature to make classifications for tax purposes, more closely than it is limited under the Fifth or Fourteenth Amendment,—[or under the similar provisions carried into Section 2 of the Organic Act for Puerto Rico];—or whether the purpose of such provisions is not really, as it has always heretofore been understood to be, simply to place the foreigner,—[or the importer of foreign goods],—on a plane of *exact equality* with the citizen, and to give him *exactly the same rights* which are secured to the citizen by the constitutional guarantees; and nothing else,—neither more nor less.

That is the crucial question here.

V

It is respectfully submitted that the writ of certiorari should be granted.

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NATHAN R. MARGOLD,
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Of Counsel.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

No. 648

MANUEL V. DOMENECH, TREASURER,
Petitioner,

vs.

SAN JUAN TRADING COMPANY, INC.

SUGGESTIONS OF THE RESPONDENT IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI AND BRIEF IN SUPPORT OF SUGGESTIONS.

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No. 648

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Petitioner,

vs.

SAN JUAN TRADING COMPANY, INC.

SUGGESTIONS OF THE RESPONDENT IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI.

Respondent, San Juan Trading Co., Inc., a corporation organized and existing under and by virtue of the laws of Puerto Rico, respectfully submits the following suggestions in opposition to the petition for writ of certiorari filed in this cause.

Summary Statement.

This action was brought to recover from the Treasurer of Puerto Rico, the sum of $26,400.00, paid under protest and collected as excise taxes due and levied upon 88,000 gross of 144 boxes each of friction safety uncolored square stick matches, packed in boxes with wooden outers or shucks, containing not less than 25 but not more than 50

sticks per box, which had been brought by the respondent into Puerto Rico to be sold, transported, transferred, used or consumed therein, the said friction safety matches having been originally produced or manufactured in the Kingdom of Sweden and imported into the United States after August 5, 1935 (R. 2).

This tax was levied and collected under the provisions of Subdivision 7 of Section 16 of Act No. 85, approved by the Legislature of Puerto Rico, August 20, 1925, commonly known as the "Internal Revenue Law of Puerto Rico" (Laws of 1925, p. 585), as amended by Act No. 146, approved May 9, 1938 (Laws of 1938, p. 325), which statute is set out in Appendix I to the supporting brief attached to the petition (pp. 43-45).

The validity of this tax and the authority of the petitioner to levy and collect the same were challenged on the grounds that the statute in question:

(a) Deprived the respondent of its life, liberty and property without due process of law, contrary to the provisions of the Fifth Amendment to the Constitution and paragraph 1 of Section 2 of the Organic Act of Puerto Rico, approved March 2, 1917, c. 145, 39 Stat. 951, 48 U. S. C. A. 737;

(b) Denied the respondent the equal protection of the laws, contrary to the provisions of the Fourteenth Amendment to the Constitution and paragraph 1 of Section 2 of the same Organic Act of Puerto Rico;

(c) Violated the provisions contained in paragraph 22 of Section 2 of the same Organic Act of Puerto Rico to the effect that the rule of taxation in Puerto Rico, shall be uniform;

(d) Violated the provisions contained in paragraph 2 of Section 3 of the same Organic Act of Puerto Rico,

as amended by the Act of March 4, 1927, c. 503, Sec. 1, 44 Stat. 1418, 48 U. S. C. A. 741a; and,

(c) Contravened and violated the provisions of Article VI of the Reciprocal Commercial Trade Agreement entered into between the United States and the Kingdom of Sweden, signed May 25, 1935, 49 Stat. (Part 2) 3755.

Opinion of the District Court.

The District Court in its Opinion (R. 18) held:

1. That there is no rational basis upon which to base a classification for taxation purposes between ROUND stick and SQUARE stick friction safety matches;

2. That there is no rational basis upon which to sustain a valid classification between SQUARE stick matches packed in boxes with wooden outers or shucks containing not less than 25 but not more than 50 sticks per box and the same SQUARE stick matches packed in boxes with wooden outers or shucks containing less than 25 or more than 50 sticks per box;

3. That ROUND stick and SQUARE stick friction safety matches are SIMILAR articles within the provisions of paragraph 2 of Section 3 of the Organic Act of Puerto Rico, as amended;

4. That ROUND stick and SQUARE stick friction safety matches are LIKE articles within the purviews of the Reciprocal Commercial Trade Agreement entered into between the United States and the Kingdom of Sweden, signed May 25, 1935; and

5. That the petitioner was only entitled to levy and collect the same excise tax on SQUARE stick friction safety

matches as is levied on ROUND stick friction safety matches under the challenged statute.

Appeal and Cross-Appeal.

The judgment of the District Court (R. 35) limited the refund to be made to the respondent, to the sum of $17,600.00, thus allowing only the return of 20 cents per gross on each of the 88,000 gross of boxes of matches above referred to. From that part of the said judgment denying the refund of the additional $8,800.00 claimed, the respondent was allowed an appeal to the United States Circuit Court of Appeals for the First Circuit, the petitioner having also taken an appeal from the judgment in its entirety (R. 35, 37).

Opinion of the Circuit Court of Appeals.

The Opinion of the Circuit Court of Appeals was rendered by a divided court. Each of the three judges wrote a separate opinion. Judge Mahoney, who wrote the Opinion of the court (R. 47-59), held the legislation challenged invalid on all the grounds upon which it was attacked, except the alleged violation of "uniformity in taxation", his opinion being in substance, the same opinion which had been rendered by the District Court (R. 18-34).

Judge Magruder concurred in the result (R. 59-62), on the ground that the classification in question violates, as expressed by him, "the spirit, and I think the letter of the proviso in Section 3 of the Organic Act" (R. 60) added by the "Butler Act" of March 4, 1927, c. 503, Sec. 1, 44 Stat. 1418, 48 U. S. C. A. 741 a.

Judge Peters dissented from the conclusion of the majority of the Court, holding the classification made to be reasonable, and that even though it may be called "narrow", that fact, in his opinion, did not authorize the court to say

that it should not be applied, adding that the discrimination which may result "is incidental to the PRINCIPAL PURPOSE of the Act which is the legitimate one of fostering home industries" (R. 62).

On the question raised by the appeal allowed to the respondent (*ante*, p. 4) with reference to the refund of the full tax paid, all three judges agreed with the District Court that the invalidity of the higher discriminatory rate only affected the excess over the lower rate, thus limiting the refund to 20 cents per gross of boxes, instead of the 30 cents claimed. This question, however, is not involved in this petition.

Petitioner's Position.

The position of the petitioner is:

1. That the Legislature of Puerto Rico, can validly make a classification of uncolored friction safety matches into SQUARE and ROUND stick matches, to protect and encourage a local industry, without violating the guarantees either of due process, of equal protection of the laws, or of uniformity in taxation, nor the provision contained both in the proviso added by the "Butler Act" to the Organic Act and in the Trade Agreement with the Kingdom of Sweden, against discrimination between articles the growth, produce or manufacture of the United States or foreign countries and "like" or "similar" articles grown, produced or manufactured in Puerto Rico.

2. That the respondent, being a domestic corporation of Puerto Rico, cannot invoke the Trade Agreement between the United States and the Kingdom of Sweden as regards a discriminatory tax exaction against articles produced or manufactured in that Kingdom and brought into Puerto Rico by the respondent.

Respondent's Position.

The respondent contends in opposition:

1. That the purpose of the "Internal Revenue Law of Puerto Rico" is to raise revenue, and the classification between ROUND and SQUARE uncolored safety matches packed in boxes with wooden outers or shucks containing not less than 25 but not more than 50 sticks per box, which has been made by the said statute is arbitrary because it is not based upon any differences bearing a substantial, reasonable and just relation to the purpose for which it is made, or to the particular subject of the legislative action.

2. That the excise tax in question is discriminatory and void, because:

(a). It subjects SQUARE uncolored stick matches packed in boxes with wooden outers or shucks containing not less than 25 but not more than 50 sticks per box, to an assessment 20 cents higher than that levied on ROUND uncolored stick matches, similarly packed; and

(b). It subjects SQUARE stick matches packed in boxes with wooden outers or shucks containing *not less* than 25 but *not more* than 50 sticks per box, to an assessment of 30 cents per gross of 144 boxes, while NO TAX WHATSOEVER is levied on the *identical* SQUARE stick matches, when packed in boxes with wooden outers or shucks containing *less* than 25 or *more* than 50 sticks per box.

3. That ROUND and SQUARE uncolored friction safety stick matches, are LIKE OR SIMILAR articles, within the provisions contained in the proviso added by the "Butler Act" to the Organic Act of Puerto Rico, and in the Trade Agreement with the Kingdom of Sweden.

4. That the Legislature of Puerto Rico, in the exercise of its police or taxing powers cannot validly resort to taxing

discriminations against articles the growth, produce or manufacture of the United States or foreign countries, and "like" or "similar" articles, grown, produced or manufactured in Puerto Rico.

5. That the provision against discrimination of similar articles the growth, produce, or manufacture of the Kingdom of Sweden, contained in the Reciprocal Commercial Trade Agreement between the United States and the Kingdom of Sweden, cannot be overridden by the Legislature of Puerto Rico and can be invoked by the respondent.

6. That SQUARE stick matches are exempted from other or higher taxes than are levied on ROUND stick matches.

Statutes.

The Constitutional Amendments; the pertinent provisions of the Reciprocal Commercial Trade Agreement entered into between the United States and the Kingdom of Sweden; and the Federal and local statutes involved in the determination of this case, are set out in the appendices to the supporting brief attached to the petition (pp. 41-55).

Reasons for Granting the Writ.

The petition (pp. 10-13) sets forth, as "Reasons for Granting the Writ" that:

1. This case presents important questions of Federal law, that have not been and it is believed should be decided by this Court, as follows:

> (a) Can the Legislature of Puerto Rico, under the "due process" clause, exercise its powers of classification in taxation for the encouragement of a type of manufacturing process adapted to develop local manufacturing industries in the Island, as against other processes not so adapted?

(b) Does the prohibition against discrimination between articles the growth, produce or manufacture of the United States or foreign countries and "like" or "similar" articles grown, produced or manufactured in Puerto Rico, contained in the Butler Act and in the Trade Agreement with Sweden, narrow the Legislature's powers of classification in taxation, and affect the legislative power to classify articles or types of processes into groups for tax purposes, or does it merely prevent discrimination within the same groups of articles?

(c) Can this respondent, a domestic corporation of Puerto Rico, invoke the Swedish Trade Agreement?

2. This case presents conflicts of opinion among the judges of the Circuit Court of Appeals for the First Circuit.

3. That the prevailing decision is in conflict with applicable decisions of this Court,

(a) As to the extent of the local legislative powers of the Legislature of Puerto Rico;

(b) As to the "freedom of classification" of the legislative powers in matters of taxation;

(c) As to the legislative power to lay taxes to encourage domestic industry.

4. That other decisions of this Court have been misapplied.

The "Reasons for Granting the Writ" Are Not Sufficient.

The respondent submits that the petition does not state sufficient reasons for granting the writ, because:

1. All of the important questions of Federal law set forth in the petition, have been either decided by this Court, or are not involved in this case in that,

(a) The excise tax in question is not levied and collected on a "type of manufacturing process" but on a finished article.

(b) That the prohibition against discrimination contained in Section 3 of the Organic Act and in the Swedish Trade Agreement, limits the power of classification in taxation vested in the Legislature of Puerto Rico as regards discriminatory exactions between articles the growth, produce, or manufacture of the United States or foreign countries or the Kingdom of Sweden, and "similar" or "like" articles grown, produced or manufactured in Puerto Rico.

2. The fact that different judges may not be in accord in rendering an opinion is not a sufficient reason as to call for an exercise of this Court's power of review or supervision, specially if the prevailing decision is correct.

3. That the prevailing decision is not in conflict with any of the decisions of this Court, nor have other decisions been misapplied.

Conclusion.

The decision of the Circuit Court of Appeals invalidating the tax in question is correct, and the petition for writ of certiorari should be denied.

L. E. Dubon,
Attorney for the Respondent.

BRIEF IN SUPPORT OF SUGGESTIONS IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI.

ARGUMENT.

POINT I.

The Respondent Cannot be Deprived of His Life, Liberty or Property Without Due Process of Law, Nor Denied the Equal Protection of the Law.

The "due process" clause of the Fifth Amendment to the Constitution as well as the provisions of the "equality" clause of the Fourteenth Amendment providing against any enactment which shall deny to any person the equal protection of the laws, are both included in Section 2 of the Organic Act of Puerto Rico, in exact terms. This, as held in *Sancho Bonet* v. *Bacardi Corporation of America,* 109 F. (2d) 57, precludes any detailed discussion as to whether these parts of the Federal Constitution extend to Puerto Rico.

The respondent in this case is a person and as such entitled to the full protection and to the rights secured by the foregoing provisions of the Federal Constitution and the Organic Act of Puerto Rico. *Southern Ry. Co.* v. *Greene,* 216 U. S. 400, 54 L. Ed. 536; *Pembina Consol. Silver Min. & Milling Co.* v. *Commonwealth of Pennsylvania,* 125 U. S. 181, 31 L. Ed. 650; *Gulf Colorado & Sta. Fe Railway Co.* v. *Ellis,* 165 U. S. 150, 41 L. Ed. 666.

Point II.

The Rule of Taxation in Puerto Rico is That All Taxes Shall be Uniform, and This Rule Also Applies to Excise Taxes.

Paragraph 22 of Section 2 of the Organic Act of Puerto Rico provides:

> "That the rule of taxation in Porto Rico shall be uniform."

This "uniformity" rule of taxation also applies to excise taxes. *Sancho Bonet* v. *Corona Brewing Corp.*, 89 F. (2d) 479, certiorari denied in *Corona Brewing Corp.* v. *Sancho Bonet*, 302 U. S. 699, 82 L. Ed. 581; *Domenech* v. *Havemeyer*, 49 F. (2d) 849; *Sanchez Morales & Co., Inc.*, v. *Gallardo*, 18 F. (2d) 550; *Goodyear Tire & Rubber Co.* v. *Gallardo*, 18 F. (2d) 926.

Point III.

The Legislative Powers of the Legislature of Puerto Rico in Respect of Local Matters are Subject to the Restrictions or Limitations Contained in the Organic Act of Puerto Rico, or Other Applicable Acts of the Congress.

The grant of legislative power in respect of local matters contained in Section 37 of the Organic Act of Puerto Rico, is as broad and comprehensive as language could make it. *People of Puerto Rico* v. *Shell Co.*, 302 U. S. 253, 82 L. Ed. 235; *People of Puerto Rico* v. *Rubert Hermanos*, 309 U. S. 543, 84 L. Ed. 916. But inasmuch as these powers have been delegated by Congress pursuant to the "territorial" clause contained in the Constitution (Article IV, Section 3, Clause 2), in the exercise of those powers, the Legislature of Puerto Rico is limited by the provisions of the Organic Act or other applicable Acts of the Congress. *Domenech*

v. *National City Bank*, 294 U. S. 199, 79 L. Ed. 857; *Haavik* v. *Alaska Packers Association*, 263 U. S. 510, 68 L. Ed. 414; *Sancho Bonet* v. *Corona Brewing Corp.*, 89 F. (2d) 479; certiorari denied in *Corona Brewing Corp.* v. *Sancho Bonet*, 302 U. S. 699, 82 L. Ed. 581; *People of Puerto Rico* v. *Shell Co., supra; People of Puerto Rico* v. *Rubert Hermanos, supra.*

POINT IV.

The Reciprocal Commercial Trade Agreement With Sweden Bound Puerto Rico and it Cannot be Overridden by the Legislature of Puerto Rico.

The provisions contained in the Reciprocal Commercial Trade Agreement entered into between the United States and the Kingdom of Sweden prohibiting discriminatory taxation or exactions between articles the growth, produce or manufacture of Sweden, and LIKE ARTICLES of national origin or any other foreign origin are binding in Puerto Rico as part of the supreme law of the land, and also because this Agreement was entered into pursuant to the provisions of other acts of Congress, and these acts did not enlarge the legislative or taxing powers conferred to the Legislature of Puerto Rico by the Organic Act.

In the recent case of *Bacardi Corp.* v. *Domenech*, decided December 9, 1940, this Court said:

> "This treaty on ratification became a part of our law. No special legislation in the United States was necessary to make it effective. Head Money Cases, 112 U. S. 580, 598, 599, 28 L. Ed. 798, 803, 804; Asakura *v.* Seattle, 265 U. S. 332, 341, 60 L. Ed. 1041, 1044. The treaty bound Puerto Rico and could not be overridden by the Puerto Rican Legislature. Asakura *v.* Seattle, supra, Nielsen *v.* Johnson, 279 U. S. 47, 52, 73 L. Ed. 607, 610; United States *v.* Belmont, 301, U. S. 324, 331, 81 L. Ed. 1134, 1139.

POINT V.

Even in Questions of Local Policy, the Legislature of Puerto Rico Must Submit to the "Treaty Making" Power of the United States.

This Court, in *Bacardi Corp.* v. *Domenech, supra,* has said:

> "The exigencies of local trade and manufacture which prompted the enactment of the statute cannot save it, as the United States in exercising its treaty making power dominates local policy."

POINT VI.

The Legislature of Puerto Rico is Vested With a Wide Discretion as Regards Distinctions or Classifications of Subjects of Taxation, Provided the Attempted Classification is Not Arbitrary.

The Legislature of Puerto Rico, as all legislative bodies, possesses wide powers of classification of the objects of legislation or of the persons whom it affects, and the "equal protection" clause does not prohibit this. This rule is so soundly established, that no citations are required. *New York Rapid Transit Corporation* v. *New York,* 303 U. S. 573, 578, 82 L. Ed. 1024, 1029. However, the classification must rest upon some rational basis, upon some difference, bearing a fair, reasonable, substantial and fair relation to the object of the legislation, to the purpose for which it is made or to the particular subject of the legislative action, a mere difference being not enough. *New York Rapid Transit Corporation* v. *New York,* 303, U. S. 573, 584, 82 L. Ed. 1024, 1033; *Southern Ry. Co.* v. *Greene,* 216 U. S. 400, 54 L. Ed. 536; *Northwestern Mut. Life Ins. Co.* v. *Wisconsin,* 247 U. S. 152, 72 L. Ed. 1025; *F. S. Royster Guano Co.* v. *Virginia,* 253 U. S. 412, 64 L. Ed. 989; *Louisville Gas & E. Co.* v. *Cole-*

man, 277 U. S. 32, 72 L. Ed. 770; *Smith* v. *Cahoon*, 283 U. S. 553, 75 L. Ed. 1264; *Ohio Oil Co.* v. *Conway*, 281 U. S. 146, 74 L. Ed. 775; *Stebbins* v. *Riley*, 268 U. S. 137, 69 L. Ed. 884; *Air-Way Electric Appliance Corp.* v. *Day*, 266 U. S. 71, 69 L. Ed. 169; *Schlesinger* v. *Wisconsin*, 270 U. S. 230, 70 L. Ed. 557; *Beers* v. *Glynn*, 211 U. S. 477, 53 L. Ed. 280; *Magoon* v. *Illinois Trust & Sav. Bank*, 170 U. S. 283, 42 L. Ed. 1037; *Merchant's & M. Nat. Bank* v. *Pennsylvania*, 167 U. S. 461, 42 L. Ed. 236; *Beel's Gap R. Co.* v. *Commonwealth of Pennsylvania*, 134 U. S. 232, 33 L. Ed. 892; *Edye* v. *Robertson*, 112 U. S. 580, 28 L. Ed. 798; *Cincinnati Soap Co.* v. *United States*, 301 U. S. 308, 81 L. Ed. 1122; *Carmichael* v. *Southern Coal & Coke Co.*, 301 U. S. 495, 81 L. Ed. 1245; *Nashville Chattanooga & St. Louis R. Co.* v. *Walters*, 294 U. S. 405, 79 L. Ed. 949; *Railroad Retirement Bd.* v. *Alton R. Co.*, 295 U. S. 330, 79 L. Ed. 1468.

Point VII.

The Object or Purpose of the "Internal Revenue Law of Puerto Rico" is the Raising of Revenue.

There can be no doubt but that the object or purpose of the "Internal Revenue Law of Puerto Rico", as that of all taxing statutes, is the raising of revenue, *Stebbins* v. *Riley*, 268 U. S. 137, 69 L. Ed. 884; *F. S. Royster Guano Co.* v. *Virginia*, 253 U. S. 412, 64 L. Ed. 989; *Air-Way Electric Appliance Corp.* v. *Day*, 266 U. S. 71, 69 L. Ed. 169. The title of this Act itself expresses this object or purpose in clear and distinct terms when it says:

> "An act to provide revenues for the People of Porto Rico by levying certain sale taxes and taxes for the manufacture, use, sale and consumption of certain products and by the levying of certain excise and license taxes on certain occupations, industries or businesses; to impose certain penalties; to repeal the laws in force

providing for excise and license taxes, and for other purposes."

POINT VIII.

The Tax in Question is Not Levied on the Process of Manufacturing Matches, But on the Finished Product.

Subdivision 7, of Section 16 of the "Internal Revenue Law of Puerto Rico", as amended by Act No. 146, approved May 9, 1938, levies an excise tax *"on matches"* and not *on the process of manufacturing matches*, and therefore the question of the power of classification in taxation of the Legislature of Puerto Rico for the encouragement of a type of manufacturing process adapted to develop local manufacturing industries in Puerto Rico as against other processes not so adapted, is not involved in this case.

POINT IX.

The Classification Between "Round" and "Square" Stick Matches Contained in Subdivision 7 of Section 16 of the "Internal Revenue Law of Puerto Rico", as Amended, Bears no Fair, Reasonable, Substantial and Just Relation to the Object of the Legislation.

The power to classify includes as well the power to subdivide the various subjects of taxation into distinct classes and different rates can be levied on the several classes, provided the classification is reasonable, and not arbitrary. The mere fact of classification, however, is not sufficient to relieve a statute from the reach of the "equality" clause, inasmuch as any classification must always rest upon some difference which bears a substantial, just and proper relation to the object of the legislation and the classification must be based on differences which furnish a reasonable ground for making a distinction between the different classes. *Gulf, Col. & S. Fe R. Co.* v. *Ellis*, 165 U. S. 150, 41 L. Ed. 666.

Act No. 146, approved May 9, 1938 (Laws of 1938, p. 325) amending Subdivision 7 of Section 16 of the "Internal Revenue Law of Puerto Rico"; approved August 20, 1925 (Laws of 1925, p. 584), makes a separate classification of matches levying a different excise on each of the different classes into which that classification has been subdivided, as follows:

(a) ROUND and SQUARE Uncolored Sticks, packed in boxes *with* wooden outers or shucks, containing *not less* than 25 but *not more* than 50 sticks per box. (Subdivisions (a) and (c).)

(b) ROUND and SQUARE Colored, Fancy Sticks, packed in boxes with wooden outers or shucks containing not less than 25 but not more than 50 sticks per box. (Subdivision (b) and (c).)

(c) Matches packed in boxes *with other* than wooden outers or shucks, regardless of *whether or not* of ROUND or SQUARE sticks, or *whether or not* Colored or Uncolored, containing *not less* than 25 but *not more* than 50 sticks per box, and those boxes containing *less* than 25 or *more* than 50 sticks per box (Paragraph 5 of Subdivision 7).

(d) Paper or cardboard matches in books of 20 matches each, and paper or cardboard matches in books of more than 20 matches each (Paragraph 7 of Subdivision 7).

(e) Wooden matches sold in the form of books (Paragraph 8 of Subdivision 7).

(f) Sperm or wax matches (Paragraph 9 of Subdivision 7).

As regards ROUND and SQUARE stick matches, this subdivision is not based upon any distinct, peculiar, intrinsic or particular grade or quality of the matches involved nor upon any difference of substance, situation or condition thereof. The law provides a tax on matches "whether sul-

phur, safety, friction, or fuses, or by whatever name known", and there is no other basis for the classification than the shape or form of the stick, the number of sticks per box, and the nature of such box or package, if with wooden outers or shucks, or otherwise, the tax rates being the following:

1. A gross of 144 boxes *with* wooden outers or shucks, containing each *not less* than 25 but *not more* than 50 uncolored ROUND stick matches, is levied with a tax of *ten cents per gross*—Subdivision (c)—while uncolored SQUARE stick matches, similarly packed, are burdened with a tax of *thirty cents per gross*—Subdivision (a).

2. A gross of 144 boxes *with* wooden outers or shucks, containing each *not less* than 25 but *not more* than 50 colored or fancy ROUND stick matches, is levied with a tax of *fifteen cents per gross*—Subdivision (d)—while colored or fancy SQUARE stick matches, similarly packed, are burdened with a tax of *thirty-six cents per gross*—Subdivision (b).

3. A gross of 144 boxes *with other* than wooden outers or shucks, containing each *not less* than 25 but *not more* than 50 matches to a box, regardless of *whether or not* these matches are colored or fancy or uncolored, or *whether or not* they are ROUND or SQUARE stick, is levied with a tax of *thirty-six cents* per gross and with a tax of *six cents on each thousand matches or fraction thereof*, if the boxes contain *less* than 25 or *more* than 50 matches to the box—Subdivision 7, clause (6).

4. A gross of 144 boxes *with* wooden outers or shucks, containing each *less* than 25 or *more* than 50 matches to a box, regardless of *whether or not* these matches are colored or fancy or uncolored, or *whether or not* they are ROUND or SQUARE stick, is levied with No Tax Whatsoever—Subdivision 7, clause (i).

It is significant, as pointed out both by the District Court (R. 29) and the Circuit Court of Appeals (R. 53) that the tax rate differential between the ROUND and the SQUARE stick matches affect only the colored or fancy and the uncolored SQUARE stick matches packed in boxes *with* wooden outers or shucks containing *not less* than 25 but *not more* than 50 sticks to the box; that there is no difference in rates between ROUND and SQUARE stick matches, whether colored or fancy, or uncolored, packed in boxes *with other* than wooden outers or shucks; and that absolutely No Tax Whatsoever is imposed on ROUND or SQUARE stick matches, whether colored or fancy or uncolored, if packed in boxes *with* wooden outers or shucks containing *less* than 25 or *more* than 50 sticks per box.

The complaint charged (R. 10) that "uncolored SQUARE stick matches and uncolored ROUND stick matches are one and the same article, without any difference whatsoever and no substantial, reasonable and just relation upon which to base a distinct classification for purposes of taxation, charges or exactions." The answer of the petitioner (R. 15) denied these allegations, saying that "uncolored square stick matches and uncolored round stick matches are not one and the same article, and that uncolored square stick matches and uncolored round stick matches have different characteristics of a substantial nature sufficient to justify the Legislature in making a reasonable and distinct classification of each, for purposes of taxation."

What are those "different characteristics of a substantial nature sufficient to justify the legislature in making a reasonable and distinct classification of each, for purposes of taxation" referred to in the answer filed by the petitioner?

The case was submitted on an agreed statement of facts, and therefore those "different characteristics of a substantial nature" and the reasons warranting the distinct classi-

fication between ROUND and SQUARE uncolored stick matches, must appear, if at all, in that statement of facts. These facts are as follows (R. 16-18):

"1. That the matches with respect to which respondent paid under protest the taxes involved in this suit were manufactured in Sweden; have an approximately square section; are packed 40 to a box and retail and for many years have retailed, at one cent per box. A box of these matches attached to the Stipulation (R. 17) shows that they are branded 'Three Stars.'

2. That on November 14, 1935, there was organized in Puerto Rico a corporation under the name of Pan American Match Company, for the purpose of manufacturing and selling matches, which corporation on or about the latter part of February 1939, began to produce, distribute, and sell in Puerto Rico, wooden safety matches, packed 40 to a box, with an approximately circular cross-section, which are retailed also at one cent per box. A box of these matches is attached to the Stipulation, and shows that they are branded 'Tres Palmas' (R. 17).

3. That the said 'Tres Palmas' are the only wooden matches produced in Puerto Rico.

4. That the only round-stick matches packed in wooden outers which are at present sold in Puerto Rico are the said 'Tres Palmas' matches produced by the Pan American Match Company; the 'Gold Medal' matches produced in continental United States by the Diamond Match Company, and the 'Three Stars' matches recently produced by Jonkopings Och Vulcans Tandsticks Fabricks A/B, and imported into Puerto Rico.

5. That the 'Tres Palmas' round-stick matches are die-cut from previously prepared blocks of soft, straight grained

white pine, known as 'Cork-Pine', whereas the 'Three Stars' square stick matches are severed directly from sheets of wood veneer of a hardwood known as Aspen.

6. That the cost to the manufacturers of the 'Three Stars' brand of producing round-stick matches is at present greater than the cost of producing square-stick matches, and that such manufacturers can not now determine whether they will ultimately be able to produce round-stick matches at a cost not greater than that of producing square stick matches."

It is to be noticed that in this Agreed Statement of Facts no reference is made whatsoever to the "characteristics" of un-colored ROUND and SQUARE stick matches *in general*, or to the "characteristics" of any particular brand of matches other than the domestic ROUND stick matches manufactured and sold by the local corporation Pan American Match Company, and the Swedish SQUARE stick matches brought into Puerto Rico by the respondent, the only differences between these two particular brands of matches disclosed by the Stipulation being:

> (a) That the stem or stick of the domestic match has an approximately round cross-section while that of the Swedish brand has an approximately square cross-section.
>
> (b) That the domestic match is die-cut from previously prepared blocks of soft, straight grained white pine, known as "Cork-Pine" while the Swedish match is severed directly from sheets of wood veneer of a hardwood known as Aspen.
>
> (c) That the *present* cost to the manufacturer of the Swedish round-stick matches is higher than the present cost to him of the Swedish square-stick matches, but he is unable to determine *now* whether he will ultimately be able to produce round-stick matches at a cost not higher than that of producing square-stick matches.

The classification is not based on retail price, because both are sold for one cent per box (R. 53); it is not based on the kind of wood, because regardless of that, a round stick match of Aspen, or any other kind of wood, pays 10 cents, while a square stick match of white or cork pine, or any other kind of wood, pays 30 cents; it is not based on the material or substance going into the preparation of the tip or head of the match, as the classification is only based on the shape of the stem or handle; it is not based on the process of their manufacture, because even if the round stick match was severed directly from sheets of wood veneer, it would pay 10 cents only, while a square stick match even if die-cut from previously prepared blocks, would pay 30 cents, inasmuch as the tax differential is based exclusively on the shape of the stem or stick, and as far as that is concerned, the matches may be whittled out with a knife or produced by any other process whatsoever. There is nothing on the record to show the kind of wood, or the process used in the manufacture of the other brands of round stick matches paying a 10 cents tax, nor the kind of wood or the process used in the manufacture of round and square stick matches generally.

There is nothing in the record to show either the relative costs of production of round and square stick matches; the cost of production of the domestic round stick matches as compared with the other round stick matches sold in Puerto Rico, or with the Swedish square stick matches involved, the only data as to cost of production of matches being that the PRESENT cost to the manufacturer of the Swedish round stick matches is higher than that of the Swedish square stick matches, but that it cannot be determined now if the manufacturer will be ultimately able to produce round stick matches at a cost not higher than that of producing the square stick matches.

But again there is not the slightest indication that the Legislature gave any consideration to the cost of production in determining the rate of the tax, because the controlling factor was only the shape of the stick coupled with the number of sticks contained per box inasmuch as the rate differential between ROUND and SQUARE stick matches affects exclusively those packed in wooden outers or shucks containing not less than 25 but not more than 50 matches per box.

The Statement of Facts discloses, however, that the domestic brand is a ROUND stick match, packed in boxes *with* wooden outers or shucks containing *not less* than 25 but *not more* than 50 sticks per box and that the Swedish product is a SQUARE stick match, packed in boxes *with* wooden outers or shucks containing also *not less* than 25 but *not more* than 50 sticks per box, and probably that was the reason for what in our opinion was a transparent discrimination in the imposition of a tax three times as heavy as between the domestic and the imported match, included within this "narrowly defined category", as was said even by Judge Mahoney in his dissenting Opinion (R. 53).

Indeed, to sustain the classification, the only reason advanced by the petitioner before this Court and the Circuit Court of Appeals is the asserted power of the Legislature of Puerto Rico to make classifications to stimulate local industries, or as quoted by Judge Mahoney in his concurring Opinion from petitioner's brief, (R. 61): "to foster the manufacture of a type of matches (round matches) being produced in the island, locally, as well as elsewhere (in the United States mainland and capable of production likewise in Sweden), as against a type (square matches) being produced only abroad, in Sweden."

Could anybody have given a more clear, specific, and candid admission that the very purpose of this act was to

keep out a product of a friendly nation, with whom the United States "on behalf of the national interest represented by the Trade Agreement Act",—*Hale* v. *Bimco Trading,* 306 U. S. 375, 83 L. Ed. 771, entered into an Agreement granting each other:

> "ARTICLE I."—"* * * unconditional and unrestricted most-favored-nation treatment in all matters concerning the customs duties and subsidiary charges of every kind and in the method of levying duties, and further, in all matters concerning the rules, formalities and charges imposed in connection with the clearing of goods through the customs, and with respect to all laws or regulations affecting the sale or use of imported goods within the country.
>
> Accordingly, natural or manufactured products having their origin in either of the countries shall in no case be subject, in regard to the matters referred to above, to any duties, taxes or charges other or higher, or to any rules or formalities other or more burdensome, than those to which are like products having their origin in any other country are or may hereafter be subject.";
>
> ARTICLE VI.—Articles the growth, produce or manufacture of the United States of America or Sweden, shall, after importation into the other country, be exempt from all internal taxes, fees, charges or exactions other or higher than those payable on like articles of national origin or any other foreign origin." Swedish Trade Agreement, 49 Stat. (Part 2) 3755.

But if that was the purpose, the fostering of the local industry of manufacturing ROUND stick matches, would appear to be equally applicable to the same type of matches packed in boxes *with other* than wooden shucks or outers, or those packed in boxes *with* wooden shucks or outers, or otherwise, containing *less* than 25 or *more* than 50 sticks per box, yet the tax rate differential *does not affect* any

of these other classifications. Again, if the Act was passed to encourage the processing of a type of matches (ROUND stick) best adapted to the local means, and to discriminate against another type of matches (SQUARE stick) which is only manufactured abroad, in Sweden, why were both types of matches, whether ROUND or SQUARE, packed in boxes *with* wooden outers or shucks containing *less* than 25 or *more* than 50 sticks per box, *left untaxed* in the challenged act, as found both by the District Court (R. 24) and the Circuit Court of Appeals? (R. 49). If we were to accept this reason as valid, it would have to be qualified by adding that the discrimination is intended exclusively to foster the local match industry of manufacturing uncolored ROUND stick matches sold in Puerto Rico in boxes *with* wooden outers or shucks containing *not less* than 25 but *not more* than 50 sticks per box as against the Swedish match industry of manufacturing uncolored square stick matches sold in Puerto Rico in the same type of boxes containing the same number of sticks per box. But this the Legislature of Puerto Rico cannot validly do. (*Infra*, Point X, pp. 25-30.)

While the latitude given to local legislatures in the matter of classification for taxation purposes may have been broadened, this has been due not to any change in the fundamental principle involved, but rather to a more searching inquiry into the justification for the classification in the situation under consideration.

The rule of law, as applied by this Court in *Maden* v. *Kentucky*, 309 U. S. 83, 87, 88, 84 L. Ed. 590, 593, is no different today than the rule stated many years ago in *Gulf, C. & S. F. R. Co.* v. *Ellis, supra:*

> "But it is said that it is not within the scope of the 14th Amendment to withhold from states the power of classification, and that if the law deals alike with all of a certain class it is not obnoxious to the charge of a denial of equal protection. While, as a general propo-

sition, this is undeniably true, Hayes *v.* Missouri, 120 U. S. 68, 30, 578; Missouri P. R. Co. *v.* Mackey, 127 U. S. 205, 32, 107; Walston *v.* Nevin, 128 U. S. 578, 32, 544; Bell's Cap R. Co. *v.* Pennsylvania, 134 U. S. 232, 33, 892; Pacific Exp. Co. *v.* Seibert, 142 U. S. 339, 35, 1035, 3 Inters. Com. Rep. 810; Giozza *v.* Tiernan, 148 U. S. 657, 37, 599; Columbus S. R. Co. *v.* Wright, 151 U. S. 470, 38, 238; Marchat *v.* Pennsylvania R. Co., 153 U. S. 380, 38, 751; St. Louis & S. F. R. Co. *v.* Mathews, 165 U. S. 1 (*ante* p. 251) yet it is equally true that such classification cannot be made arbitrarily. The state may not say that all white men shall be subjected to the payment of the attorney's fees of parties successfully suing them, and all black men not. It may not say that all men beyond a certain age shall be alone thus subjected, or all men possessed of a certain wealth. These are distinctions which do not furnish any proper basis for the attempted classification. That must always rest upon some difference which bears a reasonable and just relation to the act in respect to which the classification is proposed, and can never be made arbitrarily and without any such basis."

We submit that the conclusion arrived at by the District Court and by the Circuit Court of Appeals in the prevailing opinion rendered by Judge Mahoney to the effect that there is no rational basis for the attempted classification, and that it is therefore repugnant to Section 2 of the Organic Act, is amply supported by the record and the authorities.

Point X.

The Legislature of Puerto Rico Has No Power to Resort to Tax Classifications to Encourage or Protect Local Industries, by Putting Additional Taxes on Similar Articles Brought from the United States or Foreign Countries.

Under the provisions of Section 3 of the Organic Act, the Legislature of Puerto Rico was vested with the power to levy internal revenue taxes for the purposes of the insular

and municipal governments, but under the proviso added to the said section by the Butler Act, Congress restricted that authority prohibiting tax discriminations between articles imported from the United States or foreign countries and similar articles produced or manufactured in Puerto Rico.

The question of whether the Legislature of Puerto Rico, under its broad legislative powers can validly levy discriminatory excises "for the encouragement of a type of manufacturing process adapted to develop local manufacturing industries in Puerto Rico as against other processes not so adapted" is, as stated before, not involved in this action, but even if so, we submit that under the guise of protecting or encouraging a certain type of manufacturing or processing of a product best adapted to local means, the Legislature of Puerto Rico has no power to establish conditions which can only be satisfied by a resident manufacturer and not by a non-resident manufacturer, nor has it the power to establish different burdens on a "similar" product brought into the Island from the United States or a foreign country, because that would result in fact in a real discrimination, and an offense against the provisions contained in Sections 2 and 3 of the Organic Act. *Bethlehem Motors Corp.* v. *Flynt*, 256 U. S. 421, 426, 65 L. Ed. 1029.

After the enactment of the Butler Act, the power of the Legislature of Puerto Rico to discriminate between the products brought from the United States or foreign countries and similar domestic articles came before the Circuit Court of Appeals for the First Circuit in the case of *Sancho Bonet* v. *Corona Brewing Corporation*, 89 F. (2d) 479, certiorari denied in *Corona Brewing Corporation* v. *Sancho Bonet*, 302 U. S. 699, 820, in connection with the exemption from taxation of the finished products of an industry which under a law passed by the Legislature of Puerto Rico to foster new industries in the island, had been granted a tax

exemption of its "buildings, machinery, materials, franchises, etc., and, in general, all the properties, * * * which are necessary in their work and operation". In denying the tax exemption on the finished products of that "new-industry", the Circuit Court of Appeals held:

> "We are further of the opinion that to construe Section 2, when read in connection with Act No. 1, of March 12, 1934, as exempting from taxation the products of the plaintiff's industry, to that extent, would be to render Section 2 invalid as being in violation of Section 3 of the Organic Act of Puerto Rico, as amended; for such a construction would create a discrimination in favor of an article produced in Puerto Rico as respects similar articles imported from the United States and foreign countries and taxed in Puerto Rico. Such a discrimination Section 3 of the Organic Act forbids."

This Court in the case of *Cincinnati Soap Co.* v. *United States*, 301 U. S. 308, 81 L. Ed. 1122, involving an excise tax levied by Congress for a constitutional purpose on the first domestic processing of coconut oil, said:

> "It is improbable that a failure to exercise control over imports from the Philippines would injuriously affect the industries of this country; and, on the other hand, an exercise of the power to tax imports might prove injurious to the people of the islands. Congress in passing the legislation here under consideration, is not forbidden to balance these respective probabilities. The tax itself, it is said, was imposed for the purpose of protecting certain industries in this country; and it is challenged on that ground. That Congress has power to levy a tax with the collateral purpose of thereby protecting the industries of the United States is no longer open to doubt. J. W. Hampton, Jr., & Co. *v.* United States, 276 U. S. 394, 411, 72 L. Ed. 624, 631."

But the fact that Congress has the power to levy a tax with the *primary motive* of raising revenue for the benefit

of the general government with the *collateral or incidental* purpose of protecting the industries of the United States, does not by any means permit the Legislature of Puerto Rico to make a discriminatory classification of subjects of taxation with the *principal purpose*, as was said by Judge Peters, in his dissenting opinion (R. 62) "of fostering home industries", because:

> "Such assumption of national powers by a state has, ever since March 12, 1827 (Brown *v.* Maryland, 12 Wheat. 419, 6 L. Ed. 678), been found to be in collision with the Constitution." *Hale v. Bimco Trading Inc.*, 306 U. S. 375, 380, 83 L. Ed. 771, 776.

Even before the adoption of the Butler Act, the Legislature of Puerto Rico had not greater power to discriminate against foreign importations than the corresponding right of a State—*Porto Rico Tax Appeals*, 16 F. (2d) 545—but since the amendment to Section 3 of the Organic Act embodied in the proviso added by the said Butler Act, any doubts as to the existence of these powers is out of discussion. *West India Oil Co.* (*Porto Rico*) v. *Domenech*, decided November 12, 1940. (*Infra*, p. 36.)

This Court in *Walling* v. *Michigan*, 116 U. S. 446, 29 L. Ed. 691, said:

> "a discriminating tax imposed by a state *operating* to the disadvantage of the products of other states when introduced into the first mentioned state, is, in effect, a regulation in restraint of commerce among the states, and as such is a usurpation of the power conferred by the Constitution upon the Congress of the United States."

In *I. M. Darnell & Son Co.* v. *Memphis*, 208 U. S. 113, 123, 52 L. Ed. 413, 418, this Court after reviewing and restating its rulings concerning the nullity of any tax upon property

brought from another State as being a direct burden upon interstate commerce, if not taxed like other property situated within the State, citing *Walling* v. *Michigan, supra,* quotes with approval from *State* v. *North,* 27 Mo. 464, 471, 476, as follows:

> "But, whatever may be the motive for the tax, whether revenue, restriction, retaliation, or protection of domestic manufacturers, it is equally a regulation of commerce, and, in effect, an exercise of the power of laying duties on imports; and its exercise by the states is entirely at war with the spirit of the Constitution, and would render vain and nugatory the power granted to Congress in relation to those subjects. Can any power more destructive to the union and harmony of the states be exercised than that of imposing discriminating taxes or duties on imports from other states? Whatever may be the motive for such taxes, they cannot fail to beget irritation and to lead to retaliation; and it is not difficult to foresee that an indulgence in such a course of legislation must inflame and produce a state of feeling that would seek its gratification in any measures, regardless of the consequences."

It may be said that the "commerce" clause does not extend to Puerto Rico as held in *Lugo* v. *Suazo,* 59 F. (2d) 386, 390, and followed in *Sancho Bonet* v. *Bacardi Corp. of America,* 109 F. (2d) 57, but the prohibition contained in Section 3 of the Organic Act against discrimination between articles the growth, produce or manufacture of the other States or foreign nations and similar domestic articles embodies the same limitation of State power reserved to Congress.

The asserted power of the Legislature of Puerto Rico of resorting to tax classification for the purpose of protecting or encouraging local industries, by putting additional burdens on foreign manufacturers of similar articles brought from the United States or foreign countries is, we

submit, contrary to the express provisions of Sections 2 and 3 of the Organic Act, and is therefore inadmissible.

Point XI.

"Round" and "Square" Stick Matches are "Similar" or "Like" Articles Within the Purviews of Section 3 of the Organic Act of Puerto Rico and Article VI of the Swedish Trade Agreement.

The prohibition against discrimination between articles the growth, produce or manufacture of the United States or foreign countries and "similar" or "like" articles grown, produced or manufactured in Puerto Rico, contained in Section 3 of the Organic Act and Article VI of the Swedish Trade Agreement affects the validity of the tax in question, if "ROUND" and "SQUARE" stick matches are "like" or "similar" articles within the purviews of the said statute and the Trade Agreement. Are they?

We are ignoring, in the discussion of this point, all reference to the classification contained in the taxing statute as regards differences in the type of the box, in the number of sticks contained in each box and the tax-exemption allowed on ROUND and SQUARE stick matches packed in boxes with wooden outers or shucks, containing each less than 25 or more than 50 sticks per box referred to above (*ante*, p. 18). We are assuming that for all purposes, the ONLY classification is with respect to "ROUND" and "SQUARE" stick matches.

"SIMILAR" is defined in Webster's New International Dictionary (Second Edition, 1936) as nearly corresponding; resembling in many respects; somewhat like; having a general likeness. "LIKE" is defined in the same dictionary as having the same body, shape, or appearance; and hence, like; akin to; having the same or nearly the same appearance, qualities or characteristics; similar.

This Court, in *Greenleaf* v. *Goodrich*, 101 U. S. 272, 283, 25 L. Ed. 845, in construing that part of the Revenue Act of July 14, 1862, Section 9, 12 Stat. 552, fixing the duty to be paid on cloths composed wholly or in part of worsted, wool, or mohair, or goat's hair, and all goods of "similar" description, said:

> "The statute does not contemplate that goods classed under the words "of similar description" shall be in all respects the same. If it did, these words would be unnecessary. They were intended to embrace goods like, but not identical with, those named."

In the case of *Japan Import Co.* v. *United States*, Cust. & Pat. App., 86 F. (2d) 124, 131, the question arose as to the appraisement of certain imported goods, which under the Tariff Act of 1930, Section 336 (a) and (b) and the Proclamation of the President was to be made at the American selling price of the domestic article, like or similar to the imported foreign article as defined by Section 402(g). The court, following a series of previous decisions adopting the definition of the words, as taken from Webster's New International Dictionary (1925) held that:

> "The word "like" has been defined by us in American Foundation Inc. *v.* United States, 19 C. C. P. A. (Customs) 36, T. D. 44872, by the adoption of the definition of the word, as taken from Webster's New International Dictionary, 1925, as follows:
>
> "Having the same, or nearly the same, appearance, qualities, or characteristics; similar."

and with reference to the word "similar" held:

> "The word "similar" has had frequent attention on the part of this court. We first gave it extended attention in United States *v.* Irving Massin & Bros., 16 Cust. App. 19, T. D. 42714. The words involved in the statute there in issue were "such" or "similar." We

reiterated our former conclusion that the word "such" meant "identical", and as to the word "similar," referred to the definition given in Webster's New International Dictionary (1924) as follows: "Similar. a. 1. Nearly corresponding; resembling in many respects; somewhat like; bearing a general likeness."

"Further in the opinion, in elaborating on the meaning to be attached to the word "similar", we said: "In view of the common meaning of the word "similar" and of the authorities cited, we are of opinion, and so hold, that if goods are made of approximately the same materials, are commercially interchangeable, are adapted to substantially the same uses, and are so used, ordinarily, they are similar, within the meaning of section 402 (b). The importer or foreign manufacturer may not, by making a few changes in structure, or in giving the product a new name, or by restricting its sale to the American purchaser only, ipso facto remove his merchandise from section 402 (b), the foreign value provision."

In *Castell* v. *United States*, 20 F. Supp. 175, 179, the word "similar" was said to be a synonym for the word "like". In *Jones* v. *H. D. & J. K. Crosswell*, 60 F. (2d) 827, 829, involving excess profits taxes assessed and collected by the United States the question was if certain contractual privileges were "tangible" or "intangible property" depending on whether they could be classified as "other like property" with patents, copyrights, secret processes and formula, good-will, trade-marks, trade-brands and franchises, and the court held that those contracts were "intangible property" saying:

"The phrase "other like property" should not be given a narrow or restricted meaning. The word "like" means "substantially similar". It is thus defined in Webster's International Dictionary:

"I. Having the same, or nearly the same, appearance, qualities, or characteristics; resembling; similar to; similar, alike."

"In the Century Dictionary and Cyclopedia the word "like" is thus defined: "1. Of similar form, appearance, or quality; of corresponding kind, amount, extent, degree, etc.; corresponding; equal or equivalent; analogous; agreeing in some noticeable respect."

"Funk and Wagnalls New Standard Dictionary of the English Language gives this definition of the word "like": "1. Having resemblance; nearly identical in appearance or characteristics; approximate; similar; often formerly with to or unto before the object compared; as, like methods; as like as two peas. 2. Almost or quite the same in the quality considered; equal or nearly equal; virtually equivalent."

This Court in *United States* v. *Wallace*, 116 U. S. 398, 29 L. Ed. 675, involving the compensation payable to United States Commissioners, which under Section 847 of the Revised Statutes was to be the same as is allowed to clerks for like services, said:

"This view is met by the court of claims in the following extract from its opinion:

"The phrase 'like services' does not necessarily mean identical with; for by such a construction the compensation allowed to commissioner 'for any other service' would be defeated because of the subject matter of the duties of the commissioner and the clerk being somewhat different; but the statute must receive a reasonable construction, and where the service of the clerk bears a substantial resemblance to the duty performed by the commissioner, then under section 847, the commissioner would be entitled to the compensation allowed by law to the clerk, it being in legal substance a 'like service."

"The compensation of fifteen cents for each folio supposed to embrace this service, is given "for entering any return, rule, order, continuance, judgment, decree or recognizance, or drawing any bond, or making any record certificate, return or report." Clearly, this service has no likeness to that of keeping a docket;

while the keeping of a docket by the commissioner is a like service to the keeping of a docket by the clerk, although the docket entries to be made by each may differ."

In *City of Lincoln Center* v. *Linker,* 53 P. 787, 7 Kan. App. 282, the court, after citing Webster's definition of the adjective "like" held:

> "Thus the word in a municipal ordinance making it unlawful for any person or persons to sell any malt, hop tea, hop tea tonic, ginger ale, American hop ale, cider or any other drink of a LIKE NATURE, no matter by what name it might be called, etc., applies to liquors which are like the specified liquors, in this: that they are liquids; that they are kept in bottles; that they are nonintoxicants, that they contain a mere trace in spirits; that they are put up for the Kansas trade; and finally, that they are all used as beverages."

In *Houghton* v. *Field,* 56 Mass. (2 Cush) 141, 145, it was held:

> "Saying that one article is LIKE another does not necessarily mean that they are the same in ALL particulars, but rather the contrary, that is, that they are the same in SOME particulars, and NOT in others." See also: Bissetti *v.* Roberts, 183 P. 403, 404, 25 N. M. 365; Vinegar Bend Lumber Co. *v.* Soule Steam Feed Works, 62 So. 279, 282."

That a ROUND stick wooden match may not be *identical* to a SQUARE stick wooden match, does not mean that they are not "similar" or "like" articles, specially when they resemble each other in every respect except that the cross-section of the stem of one is circular, and that of the other is square, but they are both akin in qualities, use, appearance, and general characteristics.

Point XII.

The Provisions of Section 3 of the Organic Act, and of the Swedish Trade Agreement Restrict the Powers of Classification in Taxation Vested in the Legislature of Puerto Rico.

The petitioner contends that the phrase "like articles" contained in the Swedish Trade Agreement should be construed as in *pari materia* with the phrase "similar articles" contained in the proviso added by the Butler Act to Section 3 of the Organic Act.

But he contends that neither the aforesaid proviso nor the provisions of Article VI of the Agreement, deprived the Legislature (of Puerto Rico) of the power of classification of the objects of taxation within the limitations of due process, equal protection of the law and the rule of uniformity in taxation (Brief of Petitioner, pp. 34-39). In other words, he says:

> "If they are really "similar (or "like") products, that is to say, if there is really no substantial ground whatever for differentiation between them, then there is likewise no ground for classification between them under the Constitutional requirements of due process, equal protection of the laws, and uniformity in taxation; and any legislative attempt to set up a fictitious or wholly unsubstantial differentiation for purposes of attempted classification falls under those prohibitions. If on the other hand, there actually is any such substantial difference, of any kind, that the legislative classification placing them in different groups for taxation purposes can be sustained under those Constitutional clauses, then, by the same token, they are not "similar" (or "like") products within the meaning or the intent of the Congress in this Butler Act proviso (or the Swedish Trade Agreement). (Brief of the Petitioner pp. 35-36).

The "plain purport of the words of this proviso" as said by this Court in *West India Oil Co. (Porto Rico)* v. *Domenech,* decided November 12, 1940, cited *ut supra,* is:

> "* * * That any tax authorized by the Organic Act with respect to articles of domestic production may likewise be levied with respect to imported articles "as soon as * * * (they): are manufactured, sold, used or brought into the island" provided only that there be no tax discrimination between articles brought from the United States and foreign countries and domestic articles. The amendment seems to have been occasioned by doubts which had arisen whether merchandise brought to the island from the United States was subject to local taxation while in the original package and also whether the merchandise has, while in the control of the customs authorities, the same status as respects local taxation as goods similarly controlled which have been imported from foreign countries and whether the power of the insular legislature to tax imports from foreign countries was any greater than that of the states which are forbidden, by Clause 2, of Section 10 of Art. 1 of the Constitution, to tax imports and exports without the consent of Congress. Sen. Rept. No. 1011, 69th Congress, 1st. Sess., p. 2 * * *. These questions were involved in Porto Rico Tax Appeals (CCA 1st) 16 F. (2d) 545, decided January 7, 1927, shortly before the amendment of Section 3 of the Organic Act."

The power vested upon the Legislature of Puerto Rico by the Organic Act "to all matters of a legislative character not locally inapplicable" is "as broad and comprehensive as language could make it"—*People of Puerto Rico* v. *Shell Co., supra.*—and in the exercise of these powers surely nothing more immediately touches the local concern of Puerto Rico, than legislation to encourage and protect its home industries. Nothing would have prevented the Legis-

lature of Puerto Rico, acting within the powers delegated by Congress from resorting for this purpose to tax classifications between articles the growth, produce and manufacture of the United States or foreign countries and articles grown, produced or manufactured in the island, to the same extent as any State would have been able to act, were it not for the fact that under the Constitution, Congress is vested with the power to regulate commerce among the several States and foreign nations.

But as the fostering of these interests peculiarly concerning a local problem is, in the opinion of Congress, conflicting with national policies, the Legislature of Puerto Rico was restricted in its powers of classification for taxation purposes between articles the growth, produce and manufacture of the United States or foreign countries and "similar" articles grown, produced or manufactured in Puerto Rico.

The Butler Act did not divest the Legislature of Puerto Rico of its powers of classification in taxation, and therefore, if enacted within the scope of Section 2 of the Organic Act, a taxing statute can be upheld as a valid classification if some legitimate purpose is served thereby and the motive and the end attained are the advancement of the public good and the general welfare, but the same classification may not be upheld under the provisions of Section 3 of the Organic Act, *regardless of the legitimate purpose of the classification,* if thereby a discrimination is effected between articles produced in the United States or foreign countries, and "similar" articles produced in Puerto Rico.

The "commerce" clause has not divested the states of their power of classification of the objects of taxation, but under the guise of tax classifications they cannot put barriers to the free flow of commerce from the several states or foreign nations.

No greater rights or privileges are thereby granted the foreign producer, but the Legislature is prevented from burdening him with a higher tax based on no other reason than the foreign origin of his products, even though the motive or purpose of the tax exaction may be legitimate and proper.

POINT XIII.

The Respondent Can Invoke the Reciprocal Commercial Trade Agreement With Sweden to Avoid a Discriminatory Exaction Upon "Like" Articles Brought by it Into Puerto Rico.

Article VI of the Reciprocal Commercial Trade Agreement entered into between the United States and the Kingdom of Sweden specifically prohibit any tax discrimination between ARTICLES the growth, produce or manufacture of either country, and LIKE ARTICLES of national origin or of any other foreign origin.

The clear purpose of the treaty is to protect the ARTICLES grown, produced or manufactured in either country from higher tax exactions, than those levied upon LIKE ARTICLES of national origin or of any other foreign origin, after their importation.

The protection afforded to the articles grown, produced or manufactured in either country after their importation into the other, is a protection that covers the owners or importers thereof, as well, because a higher tax on those imported articles implies an increase in cost measured by the amount of the additional exaction.

The rights accruing under the treaty, therefore, are capable of enforcement by the owner or importer of the goods, the courts resorting to the treaty for a rule of decision for the case before it. *Head Money Tax* cases, 112 U. S. 580, 595, 28 L. Ed. 798, 804. If the protection afforded by the

Treaty could not be invoked by the importer or owner of the goods, because he is a national, that would defeat the very purpose of the treaty, and would make a mockery of it.

This Court has in the recent case of *Bacardi Corporation of America* v. *Domenech*, decided December 9, 1940, put this question at rest invalidating a statute adopted by the Legislature of Puerto Rico contrary to the protection afforded to trade-marks and labels under the General Inter-American Trade-Mark Convention of 1929, on the petition of a Pennsylvania corporation which had acquired by contract, the right to manufacture and sell rum in Puerto Rico under the trade-marks and labels of a Cuban corporation.

Point XIV.

The Square Stick Matches in Question are Exempted from Other or Higher Taxes Than are Levied on Round Stick Matches.

The Swedish Trade Agreement entered into pursuant to the powers granted the President of the United States by an Act of Congress provides under Article VI that the articles covered thereby will not be subject to "internal taxes, fees, charges or exactions, other or higher than those payable on like articles of national origin or any other foreign origin." That exemption cannot be ignored by the Legislature of Puerto Rico as it has been granted under the authority of an Act of Congress, in the interest of national industries, and is binding on the Legislature of Puerto Rico.

Upon this construction of the Trade Agreement, it is not necessary to consider the effect of Sections 2 and 3 of the Organic Act with reference to the statute in question. The matches brought into Puerto Rico by the respondent are by the express terms of the Trade Agreement exempted from other or higher taxes on like articles of national origin.

The Legislature of Puerto Rico, with the purpose of protecting and encouraging its local match manufacturing industry, levied an excise tax of 10 cents per gross on the products of local origin, and for this reason the matches of Swedish origin cannot be charged with any other tax as they are exempted by Act of Congress, from "other or higher" taxes.

It is the accepted canon that treaties should be construed liberally to give effect to the purpose which animates them, and therefore, as was said in *Bacardi Corporation of America* v. *Domenech, supra:*

> "Even where a provision of a treaty fairly admits of two constructions, one restricting, the other enlarging rights which may be claimed under it, the more liberal interpretation is to be preferred. Jordan *v.* Tashiro, 278 U. S. 123, 127, 73 L. Ed. 214, 218; Nielsen *v.* Jonson, 279 U. S. 47, 73 L. Ed. 607; Factor *v.* Laubenheimer, 290 U. S. 276, 293, 294, 78 L. Ed. 315, 324, 325."

Conclusion.

The decision of the Circuit Court of Appeals invalidating the tax in question is correct, and the Petition for Writ of Certiorari should be denied.

L. E. Dubon,
Attorney for the Respondent.

Office - Supreme Court, U. S.
JAN 6 1941
CHARLES ELMORE CROPLEY

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

No. 679

SAN JUAN TRADING CO., INC.,
Petitioner,

vs.

MANUEL V. DOMENECH, TREASURER OF PUERTO RICO.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT.

L. E. DUBON,
Counsel for the Petitioner.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

No. 679

SAN JUAN TRADING CO., INC.,

Petitioner,

vs.

MANUEL V. DOMENECH, TREASURER OF PUERTO RICO.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT.

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Petitioner, San Juan Trading Co., Inc., a corporation organized and existing under and by virtue of the laws of Puerto Rico, prays a writ of certiorari to review the judgment of the Circuit Court of Appeals for the First Circuit, entered in this cause on October 16, 1940, in case numbered and entitled on its docket "No. 3567, October Term, 1939, San Juan Trading Co., Inc., Plaintiff-Appellant *v.* Rafael Sancho Bonet, Treasurer of Puerto Rico, now substituted by Manuel V. Domenech, Treasurer of Puerto Rico, Defendant-

Appellee," affirming that part of the judgment rendered on October 23, 1939, by the United States District Court for Puerto Rico, limiting to the sum of $17,600.00, the amount of the refund granted to the petitioner of the excise taxes paid under protest to the respondent, as Treasurer of Puerto Rico.

Summary Statement.

This action was brought to recover from the Treasurer of Puerto Rico, the sum of $26,400.00, paid under protest and collected as excise taxes due and levied upon 88,000 gross of 144 boxes each of friction safety uncolored square stick matches, packed in boxes with wooden outers or shucks, containing not less than 25 but not more than 50 sticks per box, which had been brought by the petitioner into Puerto Rico to be sold, transported, transferred, used or consumed therein, the said friction safety matches having been originally produced or manufactured in the Kingdom of Sweden and imported into the United States after August 5, 1935 (R. 2).

This tax was levied and collected under the provisions of Subdivision 7 of Section 16 of Act No. 85, approved by the Legislature of Puerto Rico, August 20, 1925, commonly known as the "Internal Revenue Law of Puerto Rico" (Laws of 1925, p. 585), as amended by Act No. 146, approved May 9, 1938 (Laws of 1938, p. 325), which statute is set out in the Appendix.

The validity of this tax and the authority of the respondent to levy and collect the same were challenged on the grounds that the statute in question:

(a) Deprived the petitioner of its life, liberty and property without due process of law, contrary to the provisions of the Fifth Amendment to the Constitution and paragraph 1 of Section 2 of the Organic Act of Puerto Rico, approved March 2, 1917, c. 145, 39 Stat. 951, 48 U. S. C. A. 737;

(b) Denied the petitioner the equal protection of the laws, contrary to the provisions of the Fourteenth Amendment to the Constitution and paragraph 1 of Section 2 of the same Organic Act of Puerto Rico;

(c) Violated the provisions contained in paragraph 22 of Section 2 of the same Organic Act of Puerto Rico to the effect that the rule of taxation in Puerto Rico, shall be uniform;

(d) Violated the provisions contained in paragraph 2 of Section 3 of the same Organic Act of Puerto Rico, as amended, by the Act of March 4, 1927, c. 503, Sec. 1, 44 Stat. 1418, 48 U. S. C. A. 741a; and,

(e) Contravened and violated the provisions of Article VI of the Reciprocal Commercial Trade Agreement entered into between the United States and the Kingdom of Sweden, signed May 25, 1935, 49 Stat. (Part 2) 3755.

Opinion of the District Court.

The District Court in its opinion (R. 18) held:

1. That there is no rational basis upon which to base a classification for taxation purposes between ROUND stick and SQUARE stick friction safety matches;

2. That there is no rational basis upon which to sustain a valid classification between SQUARE stick matches packed in boxes with wooden outers or shucks containing not less than 25 but not more than 50 sticks per box and the same SQUARE stick matches packed in boxes with wooden outers or shucks containing less than 25 or more than 50 sticks per box;

3. That ROUND stick and SQUARE stick friction safety matches are SIMILAR articles within the provisions of paragraph 2 of Section 3 of the Organic Act of Puerto Rico, as amended;

4. That ROUND stick and SQUARE stick friction safety matches are LIKE articles within the purviews of the Reciprocal Commercial Trade Agreement entered into between the United States and the Kingdom of Sweden, signed May 25, 1935; and

5. That the respondent was only entitled to levy and collect the same excise tax on SQUARE stick friction safety matches as is levied on ROUND stick friction safety matches under the challenged statute.

Appeal and Cross-Appeal.

The judgment of the District Court (R. 35) limited the refund to be made to the petitioner to the sum of $17,600.00, thus allowing only the return of 20 cents per gross on each of the 88,000 gross of boxes of matches above referred to. From that part of the said judgment denying the refund of the additional $8,800.00 claimed, the petitioner was allowed an appeal to the United States Circuit Court of Appeals for the First Circuit, the respondent having also taken an appeal from the judgment in its entirety (R. 35, 37).

Opinion of the Circuit Court of Appeals.

The Circuit Court of Appeals in its opinion (R. 47), which was rendered by a divided court, affirmed the judgment of the District Court, and thus the refund allowed to the petitioner remained limited to 20 cents per gross instead of the 30 cents per gross collected by the respondent and paid him under protest.

Petitioner's Position.

The petitioner contends:

1. That ROUND and SQUARE uncolored stick matches, are like or similar articles.

2. That the excise tax in question in discriminatory and void, because;

(a) It subjects SQUARE uncolored stick matches packed in boxes with wooden outers or shucks containing not less than 25 but not more than 50 sticks per box, to an assessment 20 cents higher than that levied on ROUND uncolored stick matches, similarly packed; and

(b) It subjects SQUARE stick matches packed in boxes with wooden outers or shucks containing not less than 25 but not more than 50 sticks per box, to an assessment of 30 cents per gross of 144 boxes, while NO TAX WHATSOEVER is levied on the *identical* SQUARE stick matches, when packed in boxes with wooden outers or shucks containing less than 25 or more than 50 sticks per box.

3. That therefore the entire tax on all uncolored stick matches should be stricken off the taxing statute and the petitioner allowed the refund of the full amount of the tax paid.

Jurisdiction.

The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code of the United States, as amended by the Act of February 13, 1925, c. 229, 43 Stat. 938, 28 U. S. C. A. 347(a). The judgment of the United States Circuit Court of Appeals for the First Circuit, was entered October 16, 1940 (R. 62).

Questions Presented.

Conceding the invalidity of the excise tax in question, as found both by the District Court and the Circuit Court of Appeals, we submit that this petition presents three questions:

First. Whether the invalid or objectionable portions of the statute involved are separable, divisible and independent from the rest thereof.

Second. Whether after striking the invalid or objectionable portions of the statute involved, the remaining part is self-sustaining and enforceable without regard to that portion of the statute which has been cast aside.

Third. Can the courts, in construing a taxing statute, validly adopt a construction equalizing the tax burden, to avoid discriminatory distinctions, without encroaching on legislative functions.

Reasons Relied Upon for the Allowance of the Writ.

This case involves an important question with regard to the construction to be given to a taxing statute which is valid in part, but void as to other portions, which are separable and divisible.

The statute involved in this case levied different excises upon several distinct classes of matches, including uncolored stick matches. The tax levied upon each different class is separable from that levied upon the other several classes. The invalidity of the tax upon uncolored stick matches, in no way affects or impairs the validity of the tax levied upon the other classes of matches because wholly separable and independent of each other.

It also involves the important question with regard to the construction that may be given to taxing statutes discriminating against a particular person included within a certain class, by equalizing the burden upon all persons belonging to the same class.

Both the District Court and the Circuit Court of Appeals found that the statute in question subjected the SQUARE stick matches of the petitioner to a discriminatory assessment of 20 cents over that levied on ROUND stick matches similarly packed, and held that this was a void discrimination, but that as the petitioner was only entitled to be taxed at no higher rate than are those in like circumstances, limited

its action to remove the illegal or discriminatory excess, thus resorting to that construction as would impose a uniform tax both upon ROUND and SQUARE uncolored stick matches packed in boxes with wooden outers or shucks containing not less than 25 but not more than 50 sticks per box. In reaching this conclusion both courts ignored the discrimination in favor of SQUARE uncolored stick matches packed in boxes with wooden outers or shucks containing less than 25 or more than 50 sticks per box which were left WITHOUT ANY TAX BURDEN WHATSOEVER, and if the construction aforesaid was given to equalize the tax burden upon all persons belonging to the same class, all the stick matches should have been declared free of any tax whatsoever because otherwise tax-exempt articles by the statute, would be subjected to a tax assessment.

We submit that either court could not validity adopt a construction burdening the petitioner with any tax whatsoever without encroaching on legislative functions. We believe the question here presented has never been clearly settled by this Court, and that it should be settled.

WHEREFORE, your petitioner respectfully prays that a writ of certiorari be issued under the Seal of this Honorable Court directed to the United States Circuit Court of Appeals for the First Circuit, commanding that Court to certify and send to this Court for review and determination on a day certain to be named therein, a full and complete transcript of the record and proceedings in case numbered and entitled on its docket "No. 3567, October Term, 1939, San Juan Trading Co. Inc., Plaintiff-Appellant *v.* Rafael Sancho Bonet, Treasurer of Puerto Rico, now substituted by Manuel V. Domenech, Treasurer of Puerto Rico, Defendant-Appellee", and that the judgment of the said United States Circuit Court of Appeals for the First Circuit in the said case may be revised by this Honorable Court and

that your petitioner may have such other and further relief as to this Honorable Court may seem just, and your petitioner will ever pray.

L. E. DUBON,
Attorney for the Petitioner.

I hereby certify that I have examined the foregoing petition; that in my opinion it is well founded and entitled to the favorable consideration of this Court and that it is not filed for the purpose of delay.

San Juan, Puerto Rico.

L. E. DUBON,
Attorney.

BRIEF IN SUPPORT OF PETITION.

Opinions of the Court Below.

The opinion of the District Court is not officially reported. It is printed in the Transcript of Record at page 18. The opinion of the Circuit Court of Appeals for the First Circuit is reported in 114 F. (2d) 969.

Jurisdiction.

The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code of the United States, as amended by the Act of February 13, 1925, c. 229, 43 Stat. 938, 28 U. S. C. A. 347 (a). The judgment of the United States Circuit Court of Appeals for the First Circuit was entered October 16, 1940 (R. 62).

Questions Presented.

The questions presented are stated in the Petition filed herein.

Statutes Involved.

The constitutional provisions, the treaties and the statutes involved in the determination of this case are set out in the Appendix and are as follows:

The Fifth and the Fourteenth Amendment to the Constitution;

Article VI of the Reciprocal Commercial Trade Agreement entered into between the United States and the Kingdom of Sweden, signed May 25, 1935, 49 Stat., Part 2, 3755;

Paragraph 1 and paragraph 22 of Section 2 of the Organic Act of Puerto Rico, approved March 2, 1917, c. 145, 39 Stat. 951, 48 U. S. C. A. 737;

Paragraph 2 of Section 3 of the Organic Act of Puerto Rico, as amended March 4, 1927, c. 503, Section 1, 44 Stat. 1418, 48 U. S. C. A. 741 (a);

Subdivision 7 of Section 16 of Act No. 85, of the Legislature of Puerto Rico, approved August 20, 1925 (Laws of 1925, p. 585), as amended by Act No. 146, approved May 9, 1938 (Laws of 1938, p. 325); and

Section 108 of Act No. 85, of the Legislature of Puerto Rico, approved August 20, 1925 (Laws of 1925, p. 585).

ARGUMENT.

Point I.

The invalidity of portions of a statute does not affect separable, divisible and independent provisions thereof if self-sustaining and enforceable without regard to the objectionable portions.

In the exercise of its taxing powers, the Legislature of Puerto Rico passed the "Internal Revenue Law of Puerto Rico", selecting numerous articles upon which an excise tax was levied, omitting many others, and in so doing acted within these powers. *Flint* v. *Stone Tracy Co.*, 220 U. S. 107, 55 L. Ed. 389; *Bromley* v. *McCoughn*, 280 U. S. 124, 74 L. Ed. 226.

Subdivision 7 of Section 16 of the said "Internal Revenue Law of Puerto Rico", besides levying a tax on uncolored SQUARE stick and ROUND stick matches, packed in boxes with wooden outers or shucks, containing not less than 25 but not more than 50 sticks, levies a tax on:

1. Colored or fancy ROUND and SQUARE stick matches, packed in boxes with wooden outers or shucks, containing not less than 25 but not more than 50 sticks per box (Subdivision B and C).

2. Matches colored or uncolored, regardless of whether ROUND or SQUARE sticks, packed in boxes with

other than wooden outers or shucks, containing not less than 25 but not more than 50 sticks per box or containing less than 25 and more than 50 sticks per box. (Paragraph 6 of Subdivision 7.)

3. Paper or cardboard matches in boxes of 20 matches each, and paper and cardboard matches in boxes of more than 20 matches or less than 20 matches each. (Paragraph 7 of Subdivision 7.)

4. Wooden matches sold in the form of books. (Paragraph 8 of Subdivision 7.)

5. Sperm or wax matches. (Paragraph 9 of Subdivision 7.)

It appears that a separate classification was made of each of different kinds of matches and a distinct tax imposed on every class, in the levying, assessment or collection of which tax, no dependency exists between them, and therefore full effect may be given to the valid tax exactions contained in the said statute wtih reference to any of the different kinds or classes of the matches in question, under the rule that distinct taxes imposed by a single statute are not to be deemed inseparable unless that conclusion is unavoidable. *Marshal Field & Co.* v. *Clark*, 143 U. S. 649, 36 L. Ed. 294; *Sonzinsky* v. *United States*, 300 U. S. 506, 81 L. Ed. 772; *Carmichael* v. *Southern Coal & Coke Co.*, 301 U. S. 495, 81 L. Ed. 1245.

The invalidity, because discriminatory, of the excise tax levied upon the uncolored SQUARE stick matches involved in this suit, affects only so much of the Act of 1938, amending Subdivision 7 of Section 16 of the "Internal Revenue Law of Puerto Rico", as refers to the said uncolored SQUARE stick matches, and nothing else, more so if we take into consideration the statutory declaration contained in Section 108 of the aforementioned Law as to separability of any invalid portion of the Act which creates the pre-

sumption that eliminating any invalid part thereof, the Legislature would have been satisfied with what remained. *Champlin Ref. Co.* v. *Corporation Commission*, 286 U. S. 210, 76 L. Ed. 1062; *Electric Bond & Share Co.* v. *Security & Exchange Commission*, 303 U. S. 419, 82 L. Ed. 936.

In *Hill* v. *Wallace*, 259 U. S. 66 L. Ed. 822, it is said that such legislative declaration serves to assure the courts that separate sections or provisions of a partly invalid Act, may be properly sustained:

> "Without hesitation or doubt as to whether they would have been adopted, even if the legislature had been advised of the invalidity of parts."

In the light of this declaration, the presumption is that the legislature intended the Act to be divisible, and this presumption must be overcome by considerations which make evident the inseparability of its provisions and the clear probability that the invalid part, being eliminated, the legislature would not have been satisfied with what remains. *William* v. *Standard Oil Co.*, 278 U. S. 235, 242, 73 L. Ed. 287, 309; *Ohio Tax Case*, 232 U. S. 576, 58 L. Ed. 737.

In the case of *Field* v. *Clark*, 143 U. S. 252, 36 L. Ed. 294, involving unconstitutional features of a tariff law, these were ignored and the remainder held valid, this Court saying:

> "* * * But it cannot be assumed, nor can it be made to appear from the Act, that the provisions imposing duties on imported articles would not have been adopted except in connection with the clause giving bounties on the production of sugar in this country. These different parts of the Act, in respect to their operation, have no legal connection whatever with each other. They are entirely separable in their nature, and, in law, are wholly independent of each other. One relates to the imposition of duties upon imported articles; the other, to the appropriation of money from

the Treasury for bounties on articles produced in this country. While, in a general sense, both may be said to be parts of a system, neither the words nor the general scope of the Act justifies the belief that Congress intended they should operate as a whole, and not separately for the purpose of accomplishing the objects for which they were respectively designed. Unless it be impossible to avoid it, a general revenue statute should never be declared inoperative in all its parts because a particular part relating to a distinct subject may be invalid. A different rule might be disastrous to the financial operations of the government, and produce the utmost confusion in the business of the entire country."

In the case of *Corn* v. *Fort*, 95 S. W. (2d) 620, the statute in question levied a tax upon corporations, partnerships and trusts for the privilege of engaging in business within the state, specifically excluding from its operation individuals engaging as such in business. The Court found this classification arbitrary and capricious as regards partnerships but upholding the validity of the tax imposed upon corporations said:

"The act classifies four entities and makes them subject to a tax for the privilege of doing business in this state. Anyone of the entities so classified could have been omitted without impairing the validity of the Act as to those included. There can be no speculation as to whether or not the Legislature would have passed the act without the unconstitutional portion for it has specifically declared that it would have enacted the statute with such portion elided. The inclusion of partnerships in the classification is clearly severable, and the fact such inclusion was invalid cannot affect the validity of the balance of the act. State *v.* Scott, 98 Tenn. 259, 39 S. W. 1; State *ex Rel. v.* Cumming, 99 Tenn. 667, 42 S. W. 880; Fite *v.* State, 114 Tenn. 646, 88 S. W. 941; H. G. Hill Co. *v.* Whitice, 149 Tenn. 168, 258 S. W. 407; Williams *v.* Standard Oil Co., 278 U. S. 235, 73 L. Ed.

287." See also *Diamond Co.* v. *United States,* 187 U. S. 611, 47 L. Ed. 382; *Berea College* v. *Kentucky,* 211 U. S. 45, 53 L. Ed. 81.

The general rule is that the validity of any part of a statute cannot be impaired because some other part thereof may be found invalid, if wholly separable or divisible specially when the objectionable part can be eliminated and the balance is capable of being carried out, unless the different parts of the statute are so mutually connected with and dependent on each other as conditions, considerations, or compensations for each other as to warrant a belief that the legislature intended them as a whole, and that, if all could not be carried into effect, that it would have not passed the residue independently. *Pollock* v. *Farmer's Loan & T. Co.* (Income Tax cases), 158 U. S. 601, 39 L. Ed. 1108; *Wilcox* v. *Consolidated Gas Co.* 212 U. S. 19, 53 L. Ed. 382; *Bowman* v. *Continental Oil Co.,* 256 U. S. 647, 65 L. Ed. 1145. As was said in *People ex Rel. Barrett* v. *Union Bank & Trust Co.,* 199 N. E. 272:

> "That part of statute is unconstitutional does not authorize courts to declare remainder void unless all provisions are connected in subject-matter, depending on each other, operating together for same purpose, or are otherwise so connected in meaning that it cannot be presumed that Legislature would have passed the one without the other."

The test of severability, quoting from *Rutenberg* v. *City of Philadelphia,* 196 A. 73, 329 Pa. 26, may be stated as follows:

> "After the unvalid portion of the acts has been stricken out, whether that which remains is self-sustaining and is capable of separate enforcement, without regard to that portion of the statute which has been cast aside. If this be true, the statute should be

sustained to the extent of that which remains. See also Andrain County *v.* Hackmann, 205 S. W. 12, 275 Mo. 534."

Applying the foregoing test to the statute in question striking therefrom the discriminatory provisions contained therein, as found by the Court below, subdivision 7 of Section 16 of the Internal Revenue Law of Puerto Rico, would read as follows:

"Section 16. There shall be collected and paid, once only, an internal revenue tax on each of the following articles:

"7. MATCHES: On matches, whether sulphur, safety, friction or fuses, or by whatever name known, sold, manufactured, transported, transferred, used or consumed in, or brought into Puerto Rico, there shall be levied and collected an excise tax as follows:

"When the matches are in boxes with other than wooden outers or shucks, containing not less than twenty-five (25) matches nor more than fifty (50) matches per box, there shall be levied and collected an excise tax of thirty-six (36) cents a gross of one hundred and forty-four boxes; when the box contains less than twenty-five (25) matches or more than fifty (50) matches there shall be levied and collected an excise tax of six (6) cents on each thousand matches or fraction of a thousand.

"On paper or cardboard matches in books of twenty (20) matches each, there shall be levied and collected an excise tax of five (5) cents on each thousand matches or fraction of a thousand. Books containing more than twenty (20) matches or less than twenty (20) matches, shall pay an excise tax of six (6) cents on each thousand matches or fraction of a thousand.

"On wooden matches sold in the form of books, there shall be levied and collected an excise tax of six (6) cents on each thousand matches or fraction of a thousand.

"On sperm or wax matches there shall be levied and collected an excise tax of five (5) cents on each thousand matches or fraction of a thousand."

We submit that the foregoing statute would be self-sustaining and enforceable, and since the objectionable and discriminatory portions of the amendatory Act of 1938, are separable, divisible and independent from the rest thereof, they may be considered as elided or stricken off the said statute, and therefore, as the remaining valid portions provide no tax on the matches involved in this suit, the petitioner is entitled to be refunded of the whole amount which was collected by the respondent under the guise of a tax exaction that has been found to be invalid.

Point II.

In the construction of a statute the judiciary is not empowered to encroach on legislative functions.

As the intention of the legislature, embodied in a statute, is the law, the fundamental rule of construction is that the courts shall, by all aids available, ascertain and give effect, to the intention or purpose of the legislature as expressed in the statute, unless it is in conflict with constitutional provisions, or is inconsistent with the organic law of the state. Furthermore, when the validity of an act of the legislature is drawn in question, the courts will first ascertain whether a reasonable construction of the statute is fairly possible, in order to save it from unconstitutionality and to bring it within the fundamental law. *Crowell* v. *Benson*, 285 U. S. 22, 62, 76 L. Ed. 589, 619.

Both the District Court and the Circuit Court of Appeals construed the statute involved in this suit as levying a uniform tax of 10 cents per gross of 144 boxes, on all uncolored stick matches, without distinction between ROUND or SQUARE sticks, which were considered as LIKE or SIMILAR

articles within the purviews of Article VI of the Reciprocal Commercial Trade Agreement between the United States and the Kingdom of Sweden, and the provisions of paragraph 2 of Section 3 of the Organic Act of Puerto Rico (R. 30, 57).

In reaching this conclusion both Courts only considered those portions of the amendatory act levying a tax on uncolored stick matches packed in boxes with wooden outers or shucks containing not less than 25 but not more than 50 sticks per box, the ROUND stick being burdened with a tax of 10 cents per gross of 144 boxes, and the SQUARE stick being burdened with a tax of 30 cents per gross of 144 boxes, which tax was equalized, as aforesaid, to 10 cents for both ROUND and SQUARE stick matches.

If the only objection against the statute, as regards the SQUARE stick matches involved in this suit, had been the aforementioned discriminatory assessment in favor of ROUND stick matches, the construction adopted by both courts would be fair, reasonable and within the legislative intention to tax them at least as much as it could constitutionally do—*Singer Sewing Machine Co.* v. *Brickell*, 233 U. S. 304, 52 L. Ed. 272, and besides precedent would have the added merit of reason and reliance on substance rather than on form. *Blanco* v. *Sancho Bonet*, Treas., 55 D. P. R. 389 (Spanish Edition); *Benjamin Franklin Thrift Stores, Inc.* v. *Henneford*, 187 Wash. 472, 60 P. (2d) 86; *Wiley* v. *Parmer*, 14 Ala. 627; cf. *State* v. *Lee*, 122 Fla. 639, 166 So. 249; *Century Oil Co.* v. *Department of Agriculture*, 112 Neb. 73, 198 N. W. 569. See *Miles* v. *Department of Treasury*, 209 Ind. 172, 195, 199 N. E. 372, 382; 50 Harvard Law Review 535.

But the challenged statute, as found both by the District Court (R. 24) and by the Circuit Court of Appeals (R. 49), had left untaxed uncolored SQUARE or ROUND stick matches packed in wooden boxes containing less than 25 or more

than 50 matches per box and if the petitioner is entitled to be taxed at no higher rate than are those in like circumstance as held by the Circuit Court of Appeals (R. 58), the SQUARE stick matches involved in this action should have been also left untaxed, because other SQUARE or ROUND stick matches, as above set forth, were left without any tax at all. The fact that the Legislature of Puerto Rico after the tax on the matches involved in this suit had been levied and collected, may have amended again subdivision 7 of Section 16 of the Internal Revenue Laws of Puerto Rico (Law No. 14, approved September 9, 1938 (R. 24, 49) to include the matches originally left untaxed, did not validate the discriminatory provisions challenged, because, as aforesaid, the tax involved in this action had been levied and collected under the prior Act No. 146, approved May 9, 1938 (R. 3, 11).

We submit that the discrimination in favor of ROUND or SQUARE stick matches packed in boxes containing less than 25 or more than 50 sticks per box, which were left untaxed, as against the identical article packed in boxes containing not less than 25 but not more than 50 sticks per box, is, as held by the District Court (R. 29), palpable unfair and unjust. *Liggett* v. *Lee*, 288 U. S. 517, 77 L. Ed. 929; *Schesinger* v. *Wisconsin*, 270 U. S. 230, 70 L. Ed. 577; *Louisville Gas & E. Co.* v. *Coleman*, 277 U. S. 32, 72 L. Ed. 770.

In construing the challenged statute as levying a tax of 10 cents per gross of 144 boxes on the matches involved in this suit, both the District Court and the Circuit Court of Appeals attempted to effect the legislative intention of taxing SQUARE stick matches at least as heavily as ROUND stick matches (R. 34, 59) but that tax to be uniform and valid, would require an equal assessment on those same, identical matches left untaxed by the statute in question which can not be done as it would imply an encroachment

on clear legislative functions and for this reason that construction is not reasonably possible.

Conclusion.

It is respectfully submitted that the judgment of the Circuit Court of Appeals for the First Circuit should be reviewed by this Court for the "Reasons Relied Upon for the Allowance of the Writ" and that the judgment of the said Court be modified to allow the petitioner the additional refund of the $8,800.00 claimed.

Respectfully submitted,

L. E. Dubon,
Attorney for the Petitioner.

APPENDIX.

Constitutional Provisions, Treaties and Statutes.

Constitution:

Fifth Amendment.

No person shall be * * * deprived of life, liberty, or property, without due process of law; * * *

Fourteenth Amendment.

No state shall * * * deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws * * *.

Treaties:

The Reciprocal Commercial Trade Agreement between the United States and the Kingdom of Sweden, 49 Stat. (Part 2), 3755:

Article VI.—Articles the growth, produce or manufacture of the United States of America or Sweden, shall, after importation into the other country, be exempt from all internal taxes, fees, charges, or exactions, other or higher than those payable on Like Articles of national origin or any other foreign origin.

Statutes:

The Organic Act of Puerto Rico, Act of March 2, 1917, c. 145, 39 Stat. 951, 48 USCA 737, as amended by the Act of March 4, 1927, c. 503, Section 1, 44 Stat. 1418, 48 USCA 741(a):

Section 2.—That no law shall be enacted in Puerto Rico which shall deprive any person of life, liberty, or property without due process of law, or deny to any person therein the equal protections of the laws.

That the rule of taxation in Puerto Rico shall be uniform:

Section 3.—* * * AND IT IS FURTHER PROVIDED, That the internal revenue taxes levied by the Legislature of Puerto Rico in pursuance of the authority granted by this Act on articles, goods, wares, or merchandise may be levied and collected as such legislature may direct, on the articles subject to said tax, as soon as the same are manufactured, sold, used, or brought into the island; PROVIDED, That no discrimination be made between the articles imported from the United States or foreign countries and similar articles produced or manufactured in Puerto Rico * * *.

Puerto Rican Act #146, approved May 9, 1938 (Laws of 1938, p. 325):

AN ACT.—TO AMEND SUBDIVISION 7 OF SECTION 16 OF ACT NO. 85, ENTITLED "AN ACT TO PROVIDE REVENUES FOR THE PEOPLE OF PORTO RICO BY LEVYING CERTAIN SALE TAXES AND TAXES FOR THE MANUFACTURE, USE, SALE AND CONSUMPTION OF CERTAIN PRODUCTS AND BY THE LEVYING OF CERTAIN EXCISE AND LICENSE TAXES ON CERTAIN OCCUPATIONS, INDUSTRIES OR BUSINESSES; TO IMPOSE CERTAIN PENALTIES; TO REPEAL THE LAWS IN FORCE PROVIDING FOR EXCISE AND LICENSE TAXES, AND FOR OTHER PURPOSES," APPROVED AUGUST 20, 1925, AS AMENDED BY ACT NO. 10, OF JULY 16, 1926; ACT NO. 17, OF JULY 3, 1927; ACT NO. 18, OF APRIL 19, 1928; ACT NO. 36, OF APRIL 23, 1928; ACT NO. 74, OF MAY 6, 1930; ACT NO. 83, OF MAY 6, 1931; ACT NO. 84, OF MAY 7, 1931; ACT NO. 89, OF MAY 11, 1931; ACT NO. 18, OF APRIL 25, 1932; ACT NO. 11, OF JULY 21, 1932; JOINT RESOLUTION NO. 13 OF APRIL 18, 1933, ACT NO. 11, OF AUGUST 22, 1933 AND ACT NO. 108, OF MAY 15, 1936, AND FOR OTHER PURPOSES.

Be it enacted by the Legislature of Puerto Rico:

Section 1.—Subdivision 7 of Section 16 of Act No. 85, entitled "An Act to provide revenues for The People of Porto Rico by levying certain sale taxes and taxes for the manufacture, use, sale and consumption of certain products and by the levying of certain excise and license taxes on certain occupations, industries or businesses; to impose cer-

tain penalties; to repeal the laws in force providing for excise and license taxes, and for other purposes," approved August 20, 1925, as amended by Act No. 10, of July 16, 1926; Act No. 17, of July 3, 1927; Act No. 18, of April 19, 1928; Act No. 36, of April 23, 1928; Act No. 74, of May 6, 1930; Act No. 83, of May 6, 1931; Act No. 84, of May 7, 1931; Act No. 89 of May 11, 1931; Act No. 18, of April 25, 1932; Act No. 11, of July 21, 1932; Joint Resolution No. 13, of April 18, 1933; Act No. 11, of August 22, 1933, and Act No. 108, of May 15, 1936, is hereby amended to read as follows:

"7. Matches: On matches, whether sulphur, safety, friction, or fuses, or by whatever name known, sold, manufactured, transported, transferred, used, or consumed in, or brought into, Puerto Rico in boxes with wooden shucks, containing not less than twenty-five (25) nor more than fifty (50) matches per box, there shall be levied and collected an excise tax as follows:

"(a) Matches having uncolored square sticks, thirty (30) cents a gross of one hundred and forty-four boxes;

"(b) Matches having colored, fancy square sticks, thirty-six (36) cents per gross of one hundred and forty-four boxes;

"(c) Matches having uncolored round sticks, ten (10) cents a gross of one hundred and forty-four boxes;

"(d) Matches having colored, fancy round sticks, fifteen (15) cents a gross of one hundred and forty-four boxes.

"When the matches are in boxes with other than wooden outers or shucks, containing not less than twenty-five (25) matches nor more than fifty (50) matches per box, there shall be levied and collected an excise tax of thirty-six (36) cents a gross of one hundred and forty-four boxes; when the box contains less than twenty-five (25) matches or more than fifty (50) matches there shall be levied and collected an excise tax of six (6) cents on each thousand matches or fraction of a thousand.

"On paper or cardboard matches in books of twenty (20) matches each, there shall be levied and collected an excise tax of five (5) cents on each thousand matches or fraction of a thousand. Books containing more than twenty (20) matches or less than twenty (20) matches, shall pay an

excise tax of six (6) cents on each thousand matches or fraction of a thousand.

"On wooden matches sold in the form of books, there shall be levied and collected an excise tax of six (6) cents on each thousand matches or fraction of a thousand.

"On sperm or wax matches there shall be levied and collected an excise tax of five (5) cents on each thousand matches or fraction of a thousand." * * *

Act No. 85, of the Legislature of Puerto Rico, approved August 20, 1925 (Laws of 1925, p. 585):

Section 108. If any provision of this Act or the application thereof to any person or circumstances be declared invalid, the remainder of the Act and the application of said provisions to other persons or circumstances shall not be affected.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1940

No. 679

SAN JUAN TRADING CO., INC.,
Petitioner,

vs.

MANUEL V. DOMENECH, Treasurer of Puerto Rico,
Respondent.

SUGGESTIONS OF RESPONDENT, THE TREASURER OF PUERTO RICO, IN OPPOSITION TO THE PETITION FOR CERTIORARI IN THIS CASE

STATEMENT

This is, in effect, a cross-petition by the San Juan Trading Co., Inc., the present Petitioner, upon the same judgment of the Circuit Court of Appeals upon which the present Respondent's, the Treasurer of Puerto Rico's, original petition for certiorari, now pending here, is based [No. 648 at the present term of this Court, *Manuel V. Domenech, Treasurer, Petitioner,* vs. *San Juan Trading Co., Inc., Respondent.*

The facts are stated in our petition for certiorari in that case, No. 648 (pp. 1-3, 3-6).

As there stated (p. 3):

> "On a subsidiary question presented, all three of the judges of the Circuit Court of Appeals agree with the District Court that any invalidity of the greater rate of tax here involved extends only to the excess over the amount of the tax rate on other matches, and does not invalidate the entire tax as the respondent claims it does, but only the excess rate."

The present petition [*in effect, cross-petition, as above stated,* to No. 648] of the San Juan Trading Company is directed solely to the portion of the decision of the Circuit Court of Appeals relating to that subsidiary question.

OPINION OF THE CIRCUIT COURT OF APPEALS

That part of the prevailing majority opinion of the Circuit Court of Appeals dealing with the question here involved is the last five paragraphs of JUDGE MAHONEY'S opinion (R. 57-59; 114 F. (2d) 969, at p. 975).

STATUTES

The pertinent statutes are in Appendix I to our original petition for certiorari on behalf of the Treasurer of Puerto Rico in case No. 648 (pp. 41-54).

OPINIONS OF THE COURTS BELOW

The opinion of the District Court of the United States for the District of Puerto Rico (R. 18-34) is not officially reported. On the question here involved the District Court held against the petitioner (R. 32-34), on substantially the same ground as the Circuit Court of Appeals on this particular question.

The opinion of the Circuit Court of Appeals (three separate opinions by the three judges, but all agreeing as to the particular question here involved) is reported in 114 F. (2d) 969, 975, as above stated.

JURISDICTION

This Court appears to have jurisdiction here under Section 240(a) of the Judicial Code as amended by the Act of February 13, 1925, c. 229, 43 Stat. 938.

QUESTION PRESENTED

As above stated the sole question here presented is of the correctness of the decision of the Circuit Court of Appeals,—in agreement on this question with the District Court,—upon the subsidiary question first above stated.

The Treasurer of Puerto Rico, the respondent here, be-

lieves that, on this subsidiary question, the decision of the lower courts was correct; and that, therefore, this present cross-petition [*in effect, against our petition in* No. 648] of the San Juan Trading Company, should be denied.

RESPONDENT TREASURER'S POSITION

SAN JUAN TRADING COMPANY'S ADMISSION

The San Juan Trading Co. in its petition in the present case *expressly admits* (p. 17):

> "If the only objection against the statute, as regards the square stick matches involved in this suit, had been the aforementioned discriminatory assessment in favor of round stick matches, the construction adopted by both courts would be fair, reasonable and within the legislative intention to tax them at least as much as it could constitutionally do—*Singer Sewing Machine Co.* v. *Brickell*, 233 U. S. 304, 52 L. Ed. 272, and besides precedent would have the added merit of reason and reliance on substance rather than on form. * * *
>
> "But the challenged statute, as found both by the District Court (R. 24) and by the Circuit Court of Appeals (R. 49), had left untaxed uncolored square or round stick matches packed in wooden boxes containing less than 25 or more than 50 matches per box and if the petitioner is entitled to be taxed at no higher rate than are those in like circumstances as held by the Circuit Court of Appeals (R. 58), the square stick matches involved in this action should have been also left untaxed, because other square or round stick matches, as above set forth, were left without any tax at all."

That appears to be the whole basis of the San Juan Trading Company petition in the present case **BUT** as is pointed out in our brief for the Treasurer of Puerto Rico in case No. 648 in reply to the "Suggestions" of the San Juan Trading Co. as respondent in opposition in that case [*"Brief for Petitioner in Reply to 'Suggestions' in Opposition"*, Case No. 648, "III", pp. 3-5], **it is wholly im-**

material "that the statute here in question omitted to tax matches packed in boxes with wooden outers or shucks, containing less than twenty-five (25) matches or more than fifty (50) matches in the box".

As there pointed out, the provision in section 2 of the Organic Act for Puerto Rico, "That the rule of taxation shall be uniform", *does not impose any iron rule of universality* in taxation. The Legislature was therefore not required to tax unusual, practically non-commercial, forms of packages.

There is no suggestion anywhere, either in the complaint or in any of the briefs on behalf of the San Juan Trading Co. in this case, that the omission to tax these non-commercial forms of packages constituted any discrimination whatever against the San Juan Trading Co., or against the "square" matches imported by it, nor indicated any hostility to anyone or to any type of match. So far as this omission went, it applied to the "square" match, equally with the "round" match. The omission was therefore clearly within the powers of the Legislature.

Without here repeating what is said on this point in our reply brief, *supra*, in case No. 648 ["III", above, pp. 3-5], reference is here made to it.

It follows, therefore, *on the San Juan Trading Co.'s own admission* above quoted (*ante*, p. 3), that the decisions of the lower courts on this subsidiary question in the case were correct, and that the present petition for certiorari in this case should be denied.

Respectfully submitted,

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of Counsel.